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No. 91-

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1991

WALTER F. BIGGINS,
CROSS-PETITIONER,

v.

HAZEN PAPER COMPANY, ET AL.,
CROSS-RESPONDENTS.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CROSS PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in determining the amount of a reasonable attorneys' fee under a federal fee shifting statute, a Court should enhance the award to reflect the local market for such legal services under which the plaintiff retained an attorney on a contingent fee basis.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below were the cross petitioner/plaintiff Walter F. Biggins and the respondents to the cross petition, the Hazen Paper Company (a privately held Massachusetts Corporation), Thomas N. Hazen and Robert Hazen.

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WALTER F. BIGGINS,
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CROSS PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Cross petitioner, Walter F. Biggins, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this case on January 8, 1992. This petition is submitted as a cross petition to the petition filed on April 3, 1992 by the Hazen Paper Company, Thomas N. Hazen and Robert Hazen.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 953 F.2d 1405 (1st Cir. 1992) and is reproduced in the appendix at (A-1). The opinion of the district court of Massachusetts (Freedman, C.J.) is unreported and is reproduced in the Appendix at (A-50).

The petitioner has also provided in the appendix, the Order of the Court of Appeals dated March 19, 1992 providing an award of fees for appellate work (A-89).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on January 8, 1992. Timely petitions for rehearing were filed by both parties and were denied on January 29, 1992. On April 3, 1992 the Hazen Paper Company, Thomas N. Hazen and Robert Hazen filed a petition for a Writ of Certiorari in this Court which is now pending. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The Hazen Petition was received by the respondent on April 3, 1992.

STATUTORY PROVISIONS INVOLVED

1) The Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., which provides in material part:

> **§ 626(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion**
>
> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for

subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of section 216 and 217 of this title: *provided*, that liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief a may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

§ 216 Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

(b) Any employer who violated the provision of section 206 or section 207 of this tile shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any

employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or Sate court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 125(a)(3) of this title.

2) Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq., which provides in material part:

> **§ 1132(g) Attorney's fees and costs; awards in actions involving delinquent contributions**
>
> (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

STATEMENT OF THE CASE

This cross petition presents a specific issue already before this Court in the case of *City of Burlington* v. *Dague*, 935 F.2d 1343 (2d Cir. 1991), No. 91-810, *cert. granted*, (U.S. Jan. 27, 1992).

A. The Underlying Case

This case originated in the district court of Massachusetts in an action filed by Walter F. Biggins (hereinafter Biggins) against the Hazen Paper Company, Thomas N. Hazen and Robert Hazen (collectively hereinafter Hazen). The case arose out of the termination of Biggins' employment in June of 1986 by Hazen, and presented claims for violations of the Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 621 et seq., Employee Retirement Income Security Act (ERISA) 29 U.S.C. § 1132, and state law claims for fraud, breach of contract, conversion and violations of the Massachusetts Civil Rights Act M.G.L. c. 12, § 11I. After the jury returned verdicts in favor of Biggins under the ADEA (awarding $560,775), ERISA (awarding $100,000), breach of contract (awarding $266,897), and fraud (awarding $315,000), the district court

awarded liquidated damages under the ADEA, since the jury found the violation to be willful. The district court subsequently granted defendants' motion for judgment notwithstanding the verdict on the issue of willfulness (A. 50-80). The Court of Appeals for the First Circuit reversed this decision and reinstated the jury verdict on willfulness, (the subject of the original petition in this case), and reversed the award for breach of contract and reduced the amount of damages awarded under the ADEA (A. 1-49).

B. The Attorneys' Fee Request

Biggins filed a motion for an award of attorneys' fees with the district court under the ADEA and ERISA. In the motion, Biggins presented the court with a detailed description of the number of hours devoted to the case by each attorney and the work performed, as well as information on the attorney's normal hourly rate (A. 83-84). From this information, the district court calculated the "lodestar" in the amount of $175,564.75 (A-85). Biggins sought an enhancement of that award on grounds that counsel had taken the case on a one-third contingent fee basis, as was the practice in the relevant market. Relying on Justice O'Connor's opinion in *Pennsylvania* v. *Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*), Biggins sought to have the award enhanced to one-third of the total judgment, excluding fees, on grounds that this was the market for fees for cases of this type in the Springfield, Massachusetts area (C.A. App. 110). Biggins presented affidavits from local counsel who had experience in similar cases, establishing that a one-third contingent fee arrangement was the standard way for plaintiff's attorneys to charge in civil rights and employment cases in the local market (C.A. App. 147-153). Biggins filed an affidavit describing his agreement to the one-third contingent fee arrangement, stating that without such an arrangement he

could not have afforded to pursue the case, and that he had previously been to four other law firms, which were either unable or unwilling to take the case on a one-third contingent basis (C.A. App. 155-156). Biggins also filed an affidavit from Attorney John J. Egan who stated that Biggins had informed him that Biggins could not pay for the case on an hourly basis, that the case was therefore taken on a contingent fee because, despite risk of non payment, there was a potential for a premium in excess the normal hourly rate, and that without the prospect of enhancement, he would be discouraged from taking such cases (C.A. App. 112-118). This evidence as to the market conditions for legal services in the relevant area was not contested in any way.

C. The District Court's Award of Fees

The district court granted an award of attorneys' fees in the amount of $175,564.75 which was its calculation of the lodestar figure (A-85). The Court denied the request for enhancement on grounds that the case was "not sufficiently rare or exceptional to justify an enhancement of the lodestar." (A-86). Although the district court cited Justice O'Connor's opinion in *Delaware Valley II*, it nonetheless made its ruling disregarding that opinion's dictate that such decisions "be based on the difference in market treatment of contingent fee cases as a class rather than on an assessment of the 'riskiness' of any particular case." *Pennsylvania* v. *Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711, 731 (1987).

The district court did not reject any of the evidence with respect to contingent fees in the local market (A-86).

D. The Court of Appeals Decision

The First Circuit affirmed the denial of a fee enhancement, but did so again with reference to the risks involved in this particular case, stating that "the size of the judgment already

provides counsel with a premium" on the basis of its contingent fee arrangement, and, therefore, fee enhancement was not necessary (A-48). The First Circuit cited Justice White's plurality opinion in *Delaware Valley II*, without stating whether it considered that opinion to presently be the law (A-46-47).

There was again no dispute as to the nature of the local market for legal services of this type.

REASONS FOR GRANTING THE WRIT

This petition involves an important question of federal law concerning which the Circuit Courts are split, and which is essentially identical to the question presented in *Dague* v. *City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), No. 91-810, *cert. granted*, (U.S. Jan. 27, 1992). To the extent this case differs from *Dague*, it presents the significant supplemental issue of whether enhancement should be granted, where the local market treats cases of this type on a one-third contingent fee arrangement, and whether the failure to grant enhancement in such circumstances impermissibly penalizes the plaintiff by depleting his award and forcing him or her to bear a larger portion of the cost of litigation than a prevailing plaintiff who, because of market factors, is able to retain an attorney on an hourly rate as opposed to a contingent fee. Put another way, this case squarely presents the question of whether the Court should adopt a rule whereby enhancement is determined strictly on the basis of the local market treatment of the class of case, since the market itself will provide the mechanism for attracting competent counsel. The decision of the First Circuit was in error because, contrary to this Court's decision in *Delaware Valley II*, it assessed the availability of fee enhancement on the basis of the risks involved in the particular case itself (and the size of the verdict), rather than treating these cases uniformly

as a class, based on local market conditions. The First Circuit likewise erred in reviewing the issue only in hindsight, by asserting that risk enhancement should be assessed after the case is concluded, on the basis of the size of the verdict, rather than on the risk involved for counsel prior to knowing the outcome. The First Circuit decision is contrary to this Court's decision in *Venegas* v. *Mitchell*, 495 U.S. 82 (1990), since it denied enhancement on the basis of the fee the successful plaintiff will pay his lawyer, rather than on the basis of what the losing defendant should pay. The Court should, therefore, review this case on the basis of *Delaware Valley II* and any decision reached in *Dague* v. *City of Burlington* and remand the case to the lower court for reconsideration in light of those decisions.

1. The Issue of Enhancement of Statutory Attorneys' Fees, Is an Important Question Already Accepted by the Court and This Case Presents an Appropriate Compliment to the Case Already Before the Court

That the issue involved in the present case is an important question of federal law is clear from this Court's grant of certiorari in *Dague* v. *City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), No. 91-810, *cert. granted* (U.S. Jan. 27, 1992). This case presents the same question as presented in Dague on the basis of different local market conditions which reflect an important variant of the type of possible fee arrangements in Civil Rights and employment discrimination cases.

A. The Conflict Among the Circuit Courts

Since this Court's ruling in *Delaware Valley II*, the Circuit Courts have differed in their interpretation of that case. Here, the First Circuit cited only Justice White's plurality opinion and essentially ignored the principles of enhancement agreed to by a majority of the Justices in *Delaware Valley II*. The First Circuit did not specify which of the *Delaware Valley II*

opinions it regarded as the governing law, but its citation to Justice White's opinion to support the denial of a fee enhancement, indicates that it regards the plurality opinion as controlling. This puts the First Circuit at odds with every other Circuit Court which has considered the matter since *Delaware Valley II*. Five Circuit Courts (the 3d, 4th, 5th, 9th and 11th) have held that Justice O'Connor's opinion is the controlling law. *Rode* v. *Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990); *Student Public Interest Research Group* v. *AT & T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988); *Spell* v. *McDaniel*, 824 F.2d 1380 (4th Cir. 1987); *Alberti* v. *Klevenhagen*, 896 F.2d 927 (5th Cir. 1990); *Fadhl* v. *City and County of San Francisco*, 859 F.2d 649 (9th Cir. 1986); *Lattimore* v. *Oman Construction*, 868 F.2d 437 (11th Cir. 1989).

Three Circuit Courts have held that *Delaware Valley II* provides no governing rule of law at all: the Second Circuit granting an enhancement in *Dague* v. *City of Burlington*, 935 F.2d at 1360 (now before this Court), the District of Columbia Circuit, sitting en banc, denying an enhancement in *King* v. *Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (now before this Court on a Petition for a Writ of Certiorari, No. 91-1370), and the Sixth Circuit in *Perotti* v. *Seiter*, 935 F.2d 174 (6th Cir. 1991). This leaves the First Circuit as the lone Circuit Court following Justice White's plurality opinion.

B. This Case Is Appropriate For Review

Given that the issue of enhancement is presently before this Court, this case presents an appropriate compliment to *Dague*.

The plaintiff in this action was able to obtain counsel in the relevant legal market only on a one-third contingent basis, and only after approaching five different law firms. This situation reflected the requirements for a fee enhancement set forth in Justice O'Connor's opinion in *Delaware Valley*: there was uncontradicted evidence that without enhancement of the fee,

Biggins could not have secured counsel (and indeed was almost unable to anyway), and uncontradicted evidence that the local market compensated for the risk on a simple one-third contingent fee basis.

The First Circuit refused to consider enhancement, apparently on the ground that such an arrangement (at least where a large verdict resulted) in itself provides counsel with the necessary enhancement. Such an analysis ignores a significant purpose of fee shifting statutes: to make the wrongdoer bear the burden of the cost of litigation and not the plaintiff. Without enhancement in such a circumstance, the plaintiff cannot be made whole, but must himself bear a more significant portion of the cost than does a plaintiff who has funds to retain counsel on an hourly basis. While a large verdict may sometimes provide the attorney with a degree of enhancement, it is the plaintiff, not the defendant, who is forced to bear the burden of the enhancement, a result which could hardly have been intended by fee shifting statutes, and a result completely at odds with equity.

This case therefore provides an alternative focus for the Court to consider in determining the governing rules for fee enhancements: namely whether the plaintiff or the defendant should bear the burden of enhancement.

This case further presents the Court with the opportunity to eliminate the lower courts' confusion on this issue, by adopting a simpler rule based solely on market factors and not on case specific factors. The Court should adopt a rule whereby enhancement (or the required fee itself) is determined strictly on the basis of how the local market compensates attorneys for that type of case.

This approach eliminates the requirement put forth in *Delaware Valley II* by Justice O'Connor that the plaintiff demonstrate "substantial difficulty" in obtaining counsel without a contingent fee enhancement, but retains the case neutral market analysis test. Enhancement on the basis of market factors satisfies the concerns raised by the "substantial difficulties" test

because the market, by definition, adjusts the fee arrangement to compensate for the plaintiff's difficulty in otherwise obtaining counsel.

As it is, the "substantial difficulty" test is, for this reason, almost impossible to apply, and is a major source of confusion in the lower courts. As the Court of Appeals for the District of Columbia stated in *King* v. *Palmer*:

> To add to our quandary, even if we did have evidence that several lawyers had declined Ms. King's case, we think it would be impossible to separate out from their decision not to represent her the strength or weakness of her claim as it appeared to them at the time. After all, this is surely the principal reason a lawyer will turn down a case under a fee-shifting statute . . .
>
> The more we struggle with this problem, the more we are convinced that it is virtually impossible to determine whether a given plaintiff would have had "substantial difficulties" in obtaining counsel without a contingency enhancement. The inquiry is quite artificial, because, by definition, the plaintiff stands before the court with counsel. And since counsel could not possibly know whether a risk enhancement was in the offing until a court decides the question ten years later, our inquiry is circular.

King v. *Palmer*, 950 F.2d at 780.

By adopting a pure market approach, this court can simplify the rule and its application, while satisfying the concerns of plaintiff's need to obtain counsel and to be made whole.

C. The Court Erred in Denying Enhancement

As noted above, the First Circuit denied enhancement of the fee for the risk of contingent stating that the size of the ver-

dict itself provided counsel with a premium (A-8). This reasoning is clearly contrary to Justice O'Connor's opinion in *Delaware Valley II*, in that it necessarily looks to the risks of the particular case itself and in fact does so only with the benefit of hindsight, analyzing risk after the plaintiff has prevailed, where obviously no risk any longer exists. This guarantees that the worthiest of cases will never receive enhancement. Such reasoning effectively denies all fee enhancement whenever one-third of the verdict exceeds the lodestar figure.

This rationale not only penalizes the plaintiff who is most injured and has suffered the greatest damages, but likewise frees the most egregious violators of the law from the additional liability now reserved for those who create lesser harms. In this case, the plaintiff had economic damages in excess of $1,200,000 (A-52), and the defendants were found liable of a willful violation of the ADEA (A-51). Yet, in the eyes of the First Circuit, the size of the wrong becomes the reason to deny enhancement.

While this result damages the plaintiff most of all, it also ignores the fact that it is in those cases which involve the largest damages that counsel is more likely to be required to take the greatest risk of loss. In the present case, the lodestar as determined by the district and Circuit Courts now exceeds $240,000. It is perhaps an oversimplification, but, nonetheless, usually the case, that the larger the stakes, the greater the risk for counsel who accepts the case on a contingent basis.

The First Circuit further errs by basing its decision on the nature of the contract between counsel and the plaintiff. In *Venagas* v. *Mitchell*, 495 U.S. 82, 110 S.Ct. 1679 (1990), this Court held:

> § 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the "reasonable attor-

> ney's fee that a defendant must pay pursuant to a Court Order.

Venagas, 110 S.Ct. at 1684. The Court of Appeals, contrary to this principle, focuses only on what Biggins will pay his attorney, and in an odd twist of fate, uses it against him. Consideration of enhancement should instead be based on what the defendant must pay.

The First Circuit's opinion demonstrates that attempting to address the "substantial difficulties" test leads a court inevitably to analyze the risks of a particular case. See *King* v. *Palmer*, 950 F.2d at 780.

Adopting a pure market approach to determining the award of attorney's fees provides the enhancement necessary for plaintiffs to obtain counsel, avoids analysis of the risks of a particular case and makes the party responsible for the harm bear the costs of the litigation.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the First Circuit and preserve the plaintiff's rights while this Court considers *City of Burlington* v. *Dague*, 935 F.2d 1343 (2d Cir. 1991), No. 91-810, *cert. granted*, (U.S. Jan. 27, 1992).

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 91-1591

WALTER F. BIGGINS,
PLAINTIFF, APPELLEE,

v.

THE HAZEN PAPER COMPANY, ET AL.,
DEFENDANTS, APPELLANTS.

No. 91-1614

WALTER F. BIGGINS,
PLAINTIFF, APPELLANT,

v.

THE HAZEN PAPER COMPANY, ET AL.,
DEFENDANTS, APPELLEES.

Before
BREYER, *Chief Judge*,
BOWNES, *Senior Circuit Judge*,
TORRUELLA, SELYA and CYR, *Circuit Judges*,
and TAURO,* *District Judge*.

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*Of the District of Massachusetts, sitting by designation.

ORDER OF COURT

Entered: January 29, 1992

The panel of judges that rendered the decision in these cases having voted to deny the petitions for rehearing submitted by defendants appellants/cross appellees and plaintiff appellee/cross appellant, and their suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that these appeals be heard or reheard by the court en banc,

It is ordered that both petitions for rehearing and both suggestions for rehearing en banc be denied.

By the Court:

Clerk

[cc: Messrs. Harrington and Egan)

United States Court of Appeals
For the First Circuit

No. 91-1591

WALTER F. BIGGINS,
PLAINTIFF, APPELLEE,

v.

THE HAZEN PAPER COMPANY, ET AL.,
DEFENDANTS, APPELLANTS.

No. 91-1614

WALTER F. BIGGINS,
PLAINTIFF, APPELLANT,

v.

THE HAZEN PAPER COMPANY, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered: January 8, 1992

These causes came on to be heard on appeal from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judament of the district court is affirmed in part and reversed in part and the cause is remanded to the district court for further proceedings consistent with the opinion issued this date.

No costs to either party.

By the Court:

Clerk

(cc: Messrs. Harrington and Egan]

United States Court of Appeals
For the First Circuit

No. 91-1591

WALTER F. BIGGINS

PLAINTIFF, APPELLEE,

v.

THE HAZEN PAPER COMPANY, ET AL.,

DEFENDANTS, APPELLANTS.

No. 91-1614

WALTER F. BIGGINS

PLAINTIFF, APPELLANT,

v.

THE HAZEN PAPER COMPANY, ET AL.,

DEFENDANTS, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

(HON. FRANK H. FREEDMAN, *U.S. District Judge*)

Before

TORRUELLA, *Circuit Judge*,

BOWNES, *Senior Circuit Judge*,

and TAURO,* *District Judge*.

John M. Harrington, Jr. with whom *Robert B. Gordon, Ropes & Gray, Richard S. Hayes, Patrick W. McGinley, Raymond R. Randall* and *Sullivan & Hayes* were on brief for Hazen Paper Company, et al.

John J. Egan with whom *Maurice M. Cahillane* and *Egan, Flanagan and Cohen, P.C.* were on brief for Walter F. Biggins.

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* Of the District of Massachusetts, sitting by designation.

January 8, 1992

BOWNES, *Senior Circuit Judge*. After his employment was terminated at the Hazen Paper Company in June of 1986, Walter F. Biggins sued the company and the two individuals who owned and operated it, Robert Hazen and Thomas N. Hazen. In the district court Biggins obtained an amended judgment against the defendants in the amount of $1.78 million dollars. Both the defendants and the plaintiff appeal this judgment.

I. BACKGROUND

A. *The Jury Verdict*

The complaint alleged violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140. Pendent state law claims were also brought under Massachusetts tort and contract law and the Massachusetts Civil Rights Act (MCRA), Mass. Gen. L. ch. 12, §§ 11H and 11I. The case was jury tried.

The jury, in answer to special interrogatories, rendered the following verdict on the federal claims. It found that defendants violated the ADEA and awarded Biggins $560,775 in damages. It also found that the ADEA violation was willful. On Biggins' ERISA claim, the jury found that defendants discharged the plaintiff in order to prevent his pension benefits from vesting. Biggins was awarded $100, 000 in damages on the ERISA claim.

The jury found for the plaintiff on four Massachusetts law claims. First, on the wrongful discharge claim, the jury found that the defendants agreed to compensate Biggins by giving him shares of company stock, and that the defendants wrongfully discharged Biggins in order to deprive him of this promised stock compensation. The jury awarded plaintiff one dollar in compensatory damages on the wrongful discharge claim. The jury also found that the defendants committed fraud by failing to compensate Biggins with the stock he had been promised; it

awarded him $315,098 in damages for the fraud. The jury further found that the plaintiff and the defendants had a contract other than of at-will employment, and that the defendants breached this employment contract when they discharged him. Biggins was awarded $266,897 in compensatory damages on this claim. Finally, the jury found that the defendants violated the Massachusetts Civil Rights Act because they interfered with Biggins' exercise of his civil rights through the use of threats, intimidation or coercion. The jury awarded Biggins one dollar in damages on this claim.

The jury was also asked to determine if Biggins was the inventor, developer, and sole rightful owner of a paper coating formula and method that was developed while he worked for the defendants. The jury found that he was not.

B. *District Court Rulings on Post-Trial Motions*

After the verdict, both the defendants and the plaintiff filed post-trial motions. Defendants filed a motion pursuant to Fed. R. Civ. P. 50(b) for j.n.o.v. or, in the alternative, for a new trial. Defendants also moved to amend or alter the judgment pursuant to Fed. R. Civ. P. 59(e). Plaintiff moved for an award of costs and attorney's fees under federal and state law. Plaintiff also requested that the district court enhance any award of attorney's fees to an amount equal to one-third of the damages awarded.

The court ordered j.n.o.v. on the jury's finding that the ADEA violation was willful. That finding, if sustained, would have required an additional payment of liquidated damages equal to the amount of damages awarded for the ADEA violation. The court also ordered j.n.o.v. on the finding of a violation of the Massachusetts Civil Rights Act. In all other respects the court denied the defendants' motion for j.n.o.v. or a new trial. The court also denied the defendants' motion to alter or amend the judgment.

On plaintiff's post-trial motions, the district court further

ruled that Biggins was entitled to prejudgment interest "on his entire award because plaintiff is not entitled to liquidated damages." The court granted plaintiff's motion for attorney's fees in the amount of $175,564.57 and for costs in the amount of $9,760.07. It declined to enhance the award of attorney's fees.

C. *The Issues on Appeal*

The defendants raise three issues on appeal: (1) whether the district court erred in denying their motions for directed verdict and j.n.o.v. on all the claims submitted to the jury; (2) whether the district court erred in denying the defendants' motion to alter or amend the judgment because the damages awarded were excessive, duplicative, and unsupported by the evidence and because the award of prejudgment interest was erroneous as a matter of law; and (3) whether the district court erred in denying defendants' motion for a new trial because the verdict was against the clear weight of the evidence.

Biggins raises three issues on cross-appeal: (1) whether the court erred in granting j.n.o.v. on the jury's finding that the ADEA violation was willful; (2) whether the court erred in granting j.n.o.v. on the Massachusetts Civil Rights Act claim: and (3) whether the court erred by applying the wrong standard in determining the amount of attorney's fees and expenses to be awarded plaintiff.

We apply the same standard of review to the district court's grant or denial of motions for directed verdict and j.n.o.v. *See Veranda Beach Club Ltd. Partnership* v. *Western Sur. Co.*, 936 F.2d 1364, 1383 (1st Cir. 1991). The standard is *de novo* review "which means that we use the same stringent decisional standards that control the district court." *Hendricks & Assocs., Inc.* v. *Daewoo Corp.*, 923 F.2d 209, 214 (1st Cir. 1991). The standard has been elucidated as follows:

> The district court may grant judgment notwithstanding the verdict "only after a determination that the evidence could lead a reasonable person to only one conclusion," . . . namely, that the moving party was entitled to judgment[.]...
>
> The district court "may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence." The trial court is "compelled, therefore, even in a close case, to uphold the verdict" unless the facts and inferences, when viewed in the light most favorable to the party for whom the jury held, point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at this conclusion."

Id. at 214 (citations omitted). We review the evidence in our discussion of the issues.

II. THE ADEA CLAIM

A. *Sufficiency of the Evidence*

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973), is the foundation case on the order and allocation of proof in an employment discrimination case, where, as here, there is no direct proof of discrimination. The plaintiff must first prove a prima facie case. If this is done, the burden then shifts to the employer to articulate some nondiscriminatory reason for the employee's termination. *Id.* at 802. If this is done, the plaintiff has the opportunity to show that the reasons advanced were a cover-up for a discriminatory employment decision. *Id.* at 805. *See also Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-53 (1981); *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 575-76 (1978).

There is no doubt that plaintiff here made out a prima facie case of age discrimination. He was within the protected age

group. He was sixty-two years old at the time of his termination. He was performing his work at a level that met his employer's legitimate expectations. And he was replaced by someone younger than himself with roughly similar qualifications. *See Mesnick* v. *General Elec. Co.*, ____ F.2d ____, No. 91-1451, slip. op. at 9-10 (1st Cir. Dec. 16, 1991); *Medina-Munoz v. R. J. Reynolds Tobacco Co.*, 896 F.2d 5, 8-9 (1st Cir. 1990).

In *Connell* v. *Bank of Boston*, 924 F.2d 1169 (1st Cir.) *cert. denied*, 111 S. Ct. 2828 (1991), we held that

> [i]f a *prima facie* case is made, the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for plaintiff's discharge. The articulation of such a reason nullifies the inference raised by the *prima facie* case. Plaintiff must then clear the second hurdle by showing that the employer's articulated reasons were only a pretext for age discrimination. The plaintiff is required to "do more than simply refute or cast doubt," on the employer's rationale. He must "also show a discriminatory animus based on age." The key question becomes whether the employer fired plaintiff because of his age. We do not second-guess the business decisions of an employer.

Connell, 924 F. 2d at 1172 (citations and footnotes omitted). The defendants in this case articulated legitimate nondiscriminatory reasons for Biggins' discharge. The question is whether there was sufficient evidence for the jury to find that defendants fired plaintiff because of his age. We find that there was.

In order to understand the ADEA evidence we must first outline the evidentiary contours of the case. Hazen Paper Company is a small and successful business located in Holyoke, Massachusetts. It is privately owned and operated by two cousins, Robert Hazen and Thomas N. Hazen. Robert Hazen is the company's president and Thomas Hazen is its treasurer. The company is engaged in the manufacture of coated, foil laminated,

and printed paper and paperboard for use in such products as cosmetic wrap, lottery tickets, and pressure sensitive items. It is known as a paper converter.

Biggins was hired by Hazen Paper in 1977 as its first technical director. There was no written employment contract. Biggins was fifty-two years old when he was hired. He held a Bachelor's degree and a Master's degree in chemistry and had spent his prior work life as a technician-chemist in the paper industry.

Biggins worked for Hazen Paper for over nine and one-half years. One of the problems that Hazen Paper and the paper converter industry faced at the time Biggins started his employment was the elimination of hazardous emissions from the nitrocellulose and vinyl coatings then in general use. The elimination of such emissions was mandated by the Clean Air Act. Biggins developed a water-based paper coating that both exceeded the requirements of applicable environmental laws and resulted in a superior product in terms of gloss and durability.

By the mid-1980s that coating, referred to at trial as "Biggins Acrylic," was widely used by Hazen Paper. The company's sales increased substantially as a result of the use of the coating developed by Biggins. In 1983 Biggins became aware of this increase in sales and of the fact that the commissions of one of its sales representatives, Robert Hutchinson, had increased dramatically (to over $200,000). Because he felt that these sales commission were being made on "something that I had developed," Biggins sought an increase in pay from the company. After a meeting in 1983 with Thomas and Robert Hazen, Biggins' salary was increased by ten percent.

Biggins, however, remained dissatisfied with his compensation. In 1984, Biggins again sought an increase in his salary, which by this time was $44,000. Biggins testified that in July of 1984 he approached Thomas Hazen to tell Hazen that he wanted a raise and that he thought he was worth $100,000 to the company. According to Biggins, Hazen told him that "nobody in the company" was being paid that amount and that Hazen could not give him a salary increase to $100,000. Biggins testi-

fied that Hazen nonetheless indicated that "he would be willing to give me a piece of the company in stock, and that . . . my fortune could increase as the fortunes of the company did." Biggins also stated that Hazen said that he was prepared to "mak[e] up the difference between my salary and $100,000 in stock." Thomas Hazen denied emphatically that he promised to give Biggins any stock.

While Biggins was working for Hazen Paper, he also was involved in two private business ventures with his son. One had to do with cleaning up hazardous wastes and recovering dirty solvents produced by automobile repair shops and paper companies. The other venture was a consulting business in the environmental/ regulatory compliance area, which involved explaining to small businesses what was required under applicable regulations. When Thomas Hazen learned of the clean-up business, he concluded that Biggins had taken personal advantage of his employment at the company and that there was a great risk of Biggins disclosing company secrets to its competitors. Thomas Hazen and his cousin, Robert, told Biggins that this activity was "outrageous." Thomas Hazen had a confidentiality agreement drawn up which restricted Biggins' outside activities during his employment and for a limited time after his employment ceased. Biggins indicated he would sign the agreement if he was given a raise, but Thomas Hazen would not agree to this. He told Biggins that unless he signed the agreement as it stood, his employment would be terminated. Biggins refused to do so and his employment with Hazen Paper ceased on June 13, 1986. At the time Biggins was terminated, his pension rights, which were worth about $93,000, had not vested. They would, however, have vested a few weeks later if Biggins had not been fired.

We now turn to the evidence bearing directly on the ADEA claim. Biggins testified that both Robert and Thomas Hazen made critical comments about his age. On one occasion, Robert Hazen took out a membership for company employees in a handball court in Holyoke. At that time he told Biggins and

another employee, who was a year older than Biggins, that it would not do them much good because they were "so old." On another occasion, Thomas Hazen reminded Biggins that it was costing the company a lot more for his life insurance policy because he was "so old."

The most significant evidence on the ADEA claim comes from the facts and circumstances surrounding the termination of Biggins' employment. Biggins was asked by Thomas Hazen to sign a confidentiality agreement in the spring of 1986 because, according to Hazen, he felt that Biggins' outside business venture was improper and a threat to the company. Negotiations relative to Biggins signing the confidentiality agreement continued for weeks, during which time Biggins stated repeatedly that he would not sign the agreement unless his remuneration was increased. Thomas Hazen brought matters to a head by telling Biggins on June 13, 1986, that there would be no pay increase, and unless he signed the agreement he would be fired. Biggins refused to do so and his employment was terminated on that date.

Defendants hired a younger man to replace plaintiff, one Timothy McDonald. A confidentiality agreement was given to McDonald. It provided for 100 days separation pay. By contrast, the confidentiality agreement offered Biggins had no such provision for severance pay. McDonald's agreement also contained a six-month non-competition clause. In the agreement tendered the plaintiff, the non-competition clause was for two years.

As of June 13, 1986, Biggins had worked for the defendants for more than nine and one-half years. He was sixty-two years old. It is uncontradicted that had Biggins worked for the company a few more weeks, his right to a pension would have vested. There was uncontradicted evidence that at the time of Biggins' termination no one else in the company was subject to a confidentiality agreement.

There was additional testimony that when Thomas Hazen was told by Biggins that he would not sign the confidentiality

agreement unless it was accompanied by an increase in remuneration, Hazen suggested Biggins become a consultant to the company. Biggins would then no longer have been an employee of the company and would have lost his rights to all employee benefits. Finally, Thomas Hazen testified that he was "absolutely" aware that age discrimination was illegal.

Based on the foregoing evidence, the jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years.

Based on our review of the evidence, we find that it was within the province of the jury to decide whether age was a determining factor in the defendants' decision to terminate Biggins' employment.

B. *Was There a Willful Violation of the ADEA?*

The enforcement section of the ADEA contains the following provision: "*Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. §626(b). The ADEA, in § 626(b), adopts the definition of liquidated damages established in the Fair Labor Standards Act, 29 U.S.C. § 216(b). Liquidated damages are defined as an amount equal to the pecuniary losses suffered by the discharged employee by way of lost wages, salary increases and other benefits. *See Air Line Pilots Ass'n., Int'l* v. *Trans World Airlines, Inc.*, 713 F. 2d 940, 956 (2d Cir. 1983), *aff'd in part and rev'd in part sub nom. Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985).

In reviewing the *Trans World Airlines* case, which focused on the application of a company-wide plan or policy, the Supreme Court held that an acceptable definition of "willful violation" was the one used by the Second Circuit: "[A] violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" *Thurston*, 469 U.S. at 128 (citation omitted). The Court held that "Congress intended for liquidated damages to be punitive in nature." *Id.* at 125. The Court noted:

> Courts below have held that an employer's action may be "willful," within the meaning of § 16(a) of the FLSA, even though he did not have an evil motive or bad purpose. We do not agree with TWA's argument that unless it intended to violate the Act, double damages are inappropriate under §7(b) of the ADEA. Only one Court of Appeals has expressed approval of this position. *See Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1020, n. 27 (CA1 1979).

Id. at 126 n.19 (citation omitted). This means, as we understand it, that evil purpose or bad motive are not necessary components of a willful violation.

In a subsequent Fair Labor Standards Act case the Court reaffirmed the definition of a willful violation enunciated in *Thurston*. "The standard of willfulness that was adopted in *Thurston* — that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute — is surely a fair reading of the plain language of the Act." *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

As already noted, *Thurston* involved the application of a company policy to a group of employees. The courts of appeals have had some trouble fitting the *Thurston* standard of willfulness to disparate treatment cases. As a result the circuits have arrived at differing interpretations and modifications of *Thurston*. We, therefore, turn to a review of the relevant cases before

attempting to formulate our own definition of willfulness in a disparate treatment case.

The Second Circuit has taken a "continuum" approach.

> In light of *Thurston*, we think that "willfulness" is most easily understood when the term is analyzed along a continuum. Using that concept, at one extreme there is no liability for liquidated damages when a plaintiff proves only that the employer acted negligently, inadvertently, innocently, or even, if the employer was aware of the applicability of the ADEA, and acted reasonably and in good faith. *See McLaughlin*, 108 S. Ct. at 1681-82. The opposite point of the spectrum is revealed when a plaintiff establishes that the employer had an evil motive: such showing is sufficient for double damages, but is not necessary for an award of liquidated damages. *See Thurston*, 469 U.S. at 126 n. 17, 105 S. Ct. at 624 n. 17. Thus, in the middle of the spectrum, double damages may properly be awarded when the proof shows that an employer was indifferent to the requirements of the governing statute and acted in a purposeful, deliberate, or calculated fashion.

Benjamin v. *United Merchants and Mfrs, Inc.*, 873 F.2d 41, 44 (2d Cir. 1989).

The Third Circuit has added a requirement of "outrageous conduct" to the *Thurston* factors:

> Where an employer makes a decision such as termination of an employee because of age, the employer will or should have known that the conduct violated the Act. Nonetheless, in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages, there must be some additional evidence of outrageous conduct.

Dreyer v. *Arco Chemical Co., Div. of Atlantic Richfield Co.*, 801 F.2d 651, 658 (3d Cir. 1986). The Third Circuit felt that

under *Thurston* it "must interpret the liquidated damages provisions in a way that would not permit 'an award of double damages in almost every case' . . . . " *Id.* at 657 (citation omitted). It found its basis for adding this requirement of outrageous conduct in the Restatement (Second) of Torts §908(2). *Id.* The Court also held: "If an employer can show good faith and reasonable grounds for believing it was not in violation of the Act, a willfulness finding would be inappropriate." *Id.* at 658 (citations omitted). *See also Turner* v. *Schering-Plough Corp.*, 901 F.2d 335, 346 (3d Cir. 1990).

In *Taylor* v. *Home Insurance Company*, 777 F.2d 849, 859 (4th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986), the Fourth Circuit adopted the *Thurston* definition of willfulness without discussion.

The Fifth Circuit has interpreted *Thurston* to mean that "good faith" is no longer a valid defense to a willfulness claim:

> Under the *Thurston* rule, however, "good faith" can no longer coexist with "willfulness." The result is that only "knowing" or "reckless" violations of the ADEA are subject to liquidated damages. Thus, a further examination of good faith becomes irrelevant because it has already been factored into the *Thurston* "willfulness" definition.

Powell v. *Rockwell Int'l Corp.*, 788 F.2d 279, 287 (5th Cir. 1986). In *Hansard* v. *Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989), the court appears to have added an egregious violation requirement to the *Thurston* standard of "knowing or reckless disregard":

> The Supreme Court has held that liquidated damages are a punitive sanction and should be reserved for the most egregious violations of the ADEA. Liquidated damages should not be awarded unless the defendant acted knowingly or recklessly.
>
> The evidence is this case was weak. There is simply no

> evidence that Pepsi's actions were so egregious as to justify finding a willful violation. Pepsi was entitled to judgment on this issue.

Id. at 1470 (citations omitted).

In *Schrand* v. *Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988), the Sixth Circuit followed the Tenth Circuit and held that a defendant's conduct could be willful "only if age was the predominant factor in the decision to terminate the plaintiff." *Id.* at 158. *See also Wheeler* v. *McKinley Enter.*, 937 F.2d 1158, 1164 (6th Cir. 1991).

The Seventh Circuit follows *Thurston*'s knowing or reckless disregard definition. *Brown* v. *M & M/Mars*, 883 F.2d 505, 512 (7th Cir. 1989). It squarely rejected the Third Circuit's addition of outrageous conduct to the *Thurston* formula. *Id.* at 513.

The Eighth Circuit applies the *Thurston* standard as follows:

> We think *Thurston* means at least this: if the people making the employment decision know that age discrimination is unlawful, and if there is direct evidence -- more than just an inference from, say, an arguably pretextual justification — of age-based animus, the trier of fact may properly find willfulness.

Neufeld v. *Searle Lab.*, 884 F.2d 335, 340 (8th Cir. 1989). *See also Beshears* v. *Asbill*, 930 F.2d 1348, 1356 (8th Cir. 1991).

The Ninth Circuit follows the *Thurston* standard unadorned and has applied it retroactively. *Gilchrist* v. *Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1494-95 (9th Cir. 1986).

The Tenth Circuit, after a careful analysis of *Thurston* and a survey of the standards adopted in other circuits, held:

> Under the standard we adopt today, a basic finding of liability under the Act requires that age be at least one of possibly several "determinative factors" in the employer's conduct; for a willful violation to exist in a disparate treat-

> ment claim, a factfinder must find that age was the *predominant* factor in the employer's decision.

Cooper v. *Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988).

The Eleventh Circuit follows *Thurston* without qualification. *Formby* v. *Farmers & Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990). *See also Lindsey* v. *American Cast Iron Pipe Co.*, 810 F.2d 1094, 1099-1101 (11th Cir. 1987).

Finally, we turn to our own circuit. *Loeb* v. *Textron Inc.*, 600 F.2d 1003 (1st Cir. 1979), which was decided before *Thurston*, is the seminal case.[1] Our definition of willfulness as requiring bad purpose has been rejected by *Thurston*. *See Thurston*, 469 U.S. at 126 n.19. Specific intent to violate the ADEA is, therefore, not required to establish a willful violation.

In *Loeb*, after discussing the jury instructions on application of the *McDonnell Douglas* formula to an ADEA violation claim, we adopted the following standard governing proof of an ADEA violation:

> We do not quarrel with the court's statement that age did not have to be the sole factor motivating defendants to act; we do think, however, that the court should have instructed the jury that for plaintiff to prevail he had to prove by a preponderance of the evidence that his age was the "determining factor" in his discharge in the sense that, "but for" his employer's motive to discriminate against him because of age, he would not have been discharged.

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[1] *Loeb* held, *inter alia*, that in this circuit good faith could not be used as a defense in an ADEA case. *Id.* at 1020. We agree with the Fifth Circuit's decision in *Powell* v. *Rockwell Int'l. Corp.*, 788 F.2d 279, 287 (5th Cir. 1986), that *Thurston* has rendered the issue of good faith irrelevant.

Loeb, 600 F.2d at 1019. The "determining factor" or "but for" test has been consistently followed by us in ADEA cases in which the *McDonnell Douglas* formula applies. *See e.g.*, *Mesnick* v. *General Electric Co.*, No. 91-1451, slip. op. at 11-13; *Connell*, 924 F.2d at 1172; *Medina-Munoz*, 896 F.2d at 9; *Hebert* v. *Mohawk Rubber Co.*, 872 F.2d 1104, 1110-11 (1st Cir. 1989); *Menard v. First Sec. Serv. Corp.*, 848 F.2d 281, 285 & 287 (1st Cir. 1988).

In this circuit, the "determining factor" ingredient added by the Sixth and Tenth Circuits to the *Thurston* standard for proof of a "willful" violation of ADEA in disparate treatment cases is already a basic requirement for proof of the underlying ADEA violation itself.

With due respect, we cannot accept the Third Circuit's outrageous conduct requirement. This seems to us to fly in the face of *Thurston*, and we find the term "outrageous" simply too amorphous to be of assistance in determining what constitutes a willful violation.

We, therefore, adopt, without modification or qualification, the *Thurston* test for willfulness: "a violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" *Thurston*, 469 U.S. at 128 (citation omitted). We realize that in many cases this will result in a willful violation following hard on the heels of an ADEA violation, but that is the nature of the beast in a disparate treatment case, at least until either the Congress or the Supreme Court changes the definition of willfulness. *See Burlew* v. *Eaton Corp.*, 869 F.2d 1063, 1067 (7th Cir. 1989).

We now apply the standard to this case. The principal owner of the company, Thomas Hazen, testified that he was "absolutely" aware that age discrimination was illegal. This is as strong evidence of a knowing violation of ADEA as a plaintiff could wish. In his charge to the jury, the district judge instructed that "age must have been the determining factor" in plaintiff's discharge for the defendant's to be found liable. This was

in accord with the rule of this circuit. The court's instruction on willfulness was as follows:

> I will now instruct you on the meaning of willfulness.
>
> Under Federal law, an act is done willfully if done voluntarily and intentionally, and with a specific intent to do something the law forbids.
>
> You may find that Defendants willfully violated the age discrimination law if you find that one, that Defendants knew of or showed reckless disregard for, the law prohibiting age discrimination.
>
> And two, that Defendants, with bad purpose, intentionally disobeyed or ignored the law.
>
> In sum, if you find in Plaintiff's favor on the age discrimination claim, you must also decide whether the Plaintiff proved by a preponderance of the evidence that the violation was willful. You should not award any damages for the willfulness of the violation itself. You need only decide whether the violation of the age discrimination law is willful.

This instruction went further then necessary because the "bad purpose" requirement established by this circuit in *Loeb* was eliminated by *Thurston*. 469 U.S. at 126 n.19. The instruction misstated the applicable law, and thereby prejudiced the plaintiff because it held him to a higher standard of proof than is required by *Thurston* and this circuit.

Because the jury nonetheless found in plaintiff's favor, however, the error was harmless. The jury's finding of a willful violation of the ADEA had a solid evidentiary foundation and was in accord with jury instructions that correctly stated the applicable law except as to the requirement of "bad purpose." It was error for the district court to grant defendants' motion for j.n.o.v. on this count. The finding by the jury that there was a willful violation is reinstated.

C. *Damages Under the ADEA*

We next address the defendants' claim that the ADEA damages award was excessive, duplicative, and contrary to the evidence. Plaintiff suggests that defendants are foreclosed from raising this issue now because it was not raised below. Our review of the record discloses that, although it was not raised as explicitly below as it is here, it was argued sufficiently in defendants' post-trial motions so that the court was aware of its contours and implications. See Memorandum and order, *Biggins* v. *Hazen Paper Company*, No. 88-00225-F, slip. op. at 35-36 (D. Mass. filed April 5, 1991).

Ruling on the defendants' motion for a new trial, the district court stated:

> It is uncontested that plaintiff alleged total damages in the amount of $1,375,614.12. Plaintiff offered the testimony of Dr. Moore and Mr. Moriarty in support of that allegation, and their testimony was unrefuted. It is also true that the jury awarded a total of $1,242,772.00 in damages on all seven counts, some $132,842 less than the damages claimed by plaintiff. Because the jury did not select for total damages a figure higher than that alleged by plaintiff and evidenced in the record, the Court will not set aside any portion of the verdict on this basis.

Id. at 36 (citations omitted). We think the ruling contained in the last sentence of this order was error. Damages should not have been treated on an across-the-board basis. The jury was instructed on damages count by count and returned an award on each count separately. The damages awarded on each count should have been examined separately, not as a lump sum. This is particularly so in an ADEA award because liquidated damages always loom over the award.

Defendants argue that the evidence established that plaintiff's pretrial losses for the ADEA violation totalled $419,454.38

and that the award of $560,775.00 was excessive by the amount of $141,320.62. Plaintiff counters that there was evidence from which the jury could have awarded damages in excess of $650,000.

Plaintiff put in evidence, as exhibit 21, a document entitled "Summary of Loss." It was in effect a summary and condensation of the testimony of the two expert witnesses on damages who testified on behalf of plaintiff. The damages to which plaintiff was entitled for the ADEA violation were as follows: cash loss - $234,841.55; bonus loss - $131,275.88; lost benefits - $53,336.95. These sums totalled $419,454.38. This was all for which there was evidentiary support.[2]

The jury award of $560,775 is reduced to $419,454.38. Because we have found that there was a willful violation of the ADEA, plaintiff is entitled to liquidated damages equivalent to the amount. Damages on the ADEA count, therefore, amount to $838,908.76.

III. THE ERISA CLAIM

Defendants argue that the jury verdict finding liability under ERISA was erroneous as a matter of law because there was no evidence to support a reasonable finding that plaintiff was discharged with the specific intent of interfering with his pension vesting. We need not linger long on this issue. Plaintiff was discharged within weeks before the vesting of his pension. Although plaintiff was fired ostensibly because he refused to sign the confidentiality agreement, the jury could have found that the real reason was to deprive him of his pension benefits.

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[2] In this exhibit, the plaintiffs also alleged an additional "stock loss" of $342,498. On appeal, plaintiffs do not argue that the jury's award of damages in excess of $419,454.38 could have been derived from this figure. We also note that, as discussed in Part V, *infra*, we consider the stock loss for which Biggins recovered on the common law fraud claim separate and distinct from the $419,454.38 in back pay recovered under the ADEA claim.

The jury was entitled to draw reasonable inferences from the proximity of the date of firing and the date of vesting of plaintiff's pension.

We agree with the defendants that there should be a remittitur on the jury award of $100,000, but not of $30,000. Viewing the evidence in the light most favorable to the plaintiff, the jury could have found that he was deprived of pension funds worth $93,000. There is no basis in the record for an amount greater than that. There must, therefore, be a remittitur on this count of $7,000.

IV. MASSACHUSETTS LAW CLAIMS

The defendants also challenge the district court's denial of their motions for directed verdict and j.n.o.v. on three of the Massachusetts law claims, contending that the evidence could not reasonably have permitted the jury to find in favor of Biggins. Specifically, the appellants challenge the sufficiency of the evidence to sustain findings of liability against them under Massachusetts law for (1) wrongful discharge; (2) common law fraud; and (3) breach of a contract embodied in the Hazen Paper Company's 1980 Employee Handbook. On cross-appeal, Biggins contests the district court's grant of j.n.o.v. reversing the jury's finding of liability against the defendants under the Massachusetts Civil Rights Act. We apply the same *de novo* standard of review on the state law claims as we did on the federal claims.

A. *Wrongful Discharge*

Count IV of the complaint charged the defendants with "wrongful discharge" of Biggins in violation of Massachusetts law governing the termination of at-will employment. In *Fortune* v. *National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977), the Massachusetts Supreme Judicial Court recognized that "an employer may not in every instance terminate

without liability an employment contract terminable at will." *Cort* v. *Bristol-Myers Co.*, 385 Mass. 300, 431 N.E.2d 908, 910 (1982). *Fortune* and subsequent decisions establish that an enforceable claim for breach of a contractual condition of good faith will lie when the termination of an at-will employee is contrary to public policy. *Cort*, 431 N.E.2d at 910. *See also Gram* v. *Liberty Mut. Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21, 27-29 (1981) ; *Tenedios* v. *Wm. Filene's Sons Co.*, 20 Mass. App. Ct. 252, 479 N.E. 2d 723, 726 (1985); *Siles* v. *Travenol Laboratories, Inc.*, 13 Mass. App. Ct. 354, 433 N.E.2d 103, 106, *app. denied*, 386 Mass. 1103, 440 N.E.2d 1176 (1982).

In *Cort* and *Gram*, the Massachusetts Supreme Judicial Court found that an "employer's predatory motivation . . . can be classified as a reason contrary to public policy." *Cort*, 431 N.E.2d at 910; *Gram*, 429 N.E.2d at 29. In *Gram*, the Supreme Judicial Court held that

> the obligation of good faith and fair dealing imposed on an employer requires that the employer be liable for the loss of compensation that is so clearly related to an employee's past service, when the employee is discharged without good cause.

Gram, 429 N.E.2d at 29. In establishing these principles governing the liability of an employer for an employee's discharge in the absence of good cause, the *Gram* court was careful to distinguish between recovery based on the employee's loss of future wages for *past* services, and any claim for recovery based on loss of *future* income for future services. *Id.* The Massachusetts Supreme Judicial Court explicitly limited this theory of "wrongful discharge" to situations in which the employee's discharge without good cause deprives the employee of compensation for services previously earned or past services. *Cort*, 431 N.E.2d at 908. In order to establish a claim of wrongful termination, the discharge must be

> contrived to despoil an employee of earned commission or similar compensation due for past services . . . . That the plaintiff was fired arbitrarily and was injured in her expectations of future wages or other future emoluments does not, without more, encompass the *Fortune*-type of liability, however meretricious we may consider the dismissal to have been.

Tenedios, 479 N.E.2d at 726 (citations omitted).

In the instant case, the jury found that the defendants had agreed in 1984 to compensate Biggins with shares of Hazen Paper Company Stock. It also found that the defendants wrongfully discharged Biggins in 1986 in order to deprive him of the promised stock compensation. The jury awarded one dollar in compensatory damages. In motions for directed verdict and j.n.o.v., the defendants attacked the legal sufficiency of the evidence to support a finding of wrongful discharge. In both motions, they insisted that the promise of stock to Biggins was not an enforceable contract. They argued that a contract could not have been formed because Biggins did not own the formula for the acrylic process which he allegedly used as the bargaining chip for the stock. Lack of ownership of the rights to that formula meant that Biggins could not have given any consideration in return for the promise of stock. Consequently, the defendants claimed that because there was no consideration for the alleged stock agreement, there was no enforceable contract for the payment of stock, and therefore no deprivation of past "compensation" already earned within the meaning of *Fortune* and its progeny.

The district court rejected these arguments, holding that Biggins provided "ample consideration" for the alleged stock agreement — namely, "the present and continued satisfactory performance of services for Hazen Paper Company." The court noted that the jury's rejection of Biggins' claim of ownership of the acrylic formula precluded argument by Biggins that his ownership of the formula constituted valid consideration for

the stock promise. Nonetheless, the court concluded that Biggins' continued service as an employee of the company subsequent to the alleged stock promise would in and of itself constitute adequate consideration for any stock agreement.

On appeal, the defendants renew the argument that the evidence was legally insufficient to establish that Thomas Hazen's promise of stock to Biggins in 1984 was earned, contractually-established "compensation." They insist that there can be no *Fortune-based* claim because Biggins failed to establish any contractual expectancy that was in fact defeated by reason of his discharge from employment.

Viewing the evidence in the light most favorable to the non-moving party, we find that the district court correctly concluded that there was adequate evidence to support the jury's finding that consideration sufficient to support an agreement for "compensation" inhered in Biggins' continued performance of services for the Hazen Paper Company. Biggins testified that when he requested a raise in his annual compensation in 1984, Thomas Hazen promised to give him stock worth the difference between his preexisting $44,000 annual compensation and a $100,000 annual compensation level. The jury could have found that Biggins' decision to continue as an employee with Hazen Paper was consideration for an agreement to increase his annual compensation. *See Jackson* v. *Action for Boston Community Dev., Inc.*, 403 Mass. 8, 525 N.E.2d 411, 415 (1988) (citing *Simons* v. *American Dry Ginger Ale Co.*, 335 Mass. 521, 526, 140 N.E.2d 649 (1957)) (for an employee to remain with employer can, in appropriate circumstances, supply adequate consideration for employment contract). We, therefore, hold that there was adequate evidence to support the jury's finding that Biggins' discharge in 1986 deprived him of "compensation" for past services within the meaning of Massachusetts wrongful discharge doctrine.

We find unavailing appellants' continued insistence that any promise of stock by Thomas Hazen to Biggins could never have

constituted an enforceable contract.[3] The appellants renew the argument made below that any offer of stock by Thomas Hazen which did not specify the quantity or class of stock promised, or the time of its delivery to Biggins, would lack the requisite definiteness to be enforced as a contract. We think that the issue of whether Thomas Hazen's alleged offer of stock was sufficiently definite was a question of fact, which the jury could properly resolve in favor of Biggins. *See, e.g., Rizzo* v. *Cunningham*, 303 Mass. 16, 20 N.E.2d 471, 474 (1939) ("where a contract is oral, the question of what the contract is must, if controverted, be tried by a jury as a question of fact . . . . ").[4] There was evidence for the jury to find that Hazen's promise of an amount of stock necessary to raise Biggins' annual compensation to the amount of $100,000 was sufficiently definite to create an enforceable contract.[5]

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[3] Appellants claim that "plaintiff at no time suggested in any of his pleadings below that he was entitled to Hazen Paper stock as a matter of contract law." We note that ¶ 11 of Biggins' Amended Complaint alleges that in response to Thomas Hazen's promise that he would provide Biggins with stock "sufficient to raise his salary . . . [to] $100,000[,] [t]he plaintiff agreed to this offer and in reliance on the defendant's promise continued to allow the defendant company to make use of his formula and process . . . *and continued his employment with the defendant corporation*." (Emphasis added). While Biggins did not allege any independent claim of breach of contract based on failure to deliver the allegedly promised stock, it is clear that in his wrongful discharge claim Biggins alleged the contractual elements necessary to support a claim of deprivation of previously earned "compensation."

[4] In *Rizzo*, the Massachusetts Supreme Judicial Court reinstated a jury verdict in favor of a plaintiff seeking to recover on an oral contract for personal services. The Court concluded that "the conversation upon which the jury was permitted to find an agreement . . . was not too vague and indefinite to form the basis for a contract." 20 N.E.2d at 475.

[5] The appellants also argue that any contract based on an agreement to give Biggins stock in the Hazen Company would not be enforceable because it was an oral promise unsupported by a writing that would fail under the Massachusetts statute of frauds. In the district court below, however, appellants never raised this argument, preferring instead to rely on assertions that there could have been no consideration for any contract based on Biggins' ownership of the formula for the acrylic. Because the defendants did not raise these objections in the district court, we decline to address them on appeal. *See, e.g., Boston Celtics Ltd. Partnership* v. *Shaw*, 908 F.2d 1041, F045 (1st Cir. 1990).

Because the jury could have determined that Hazen's promise of stock was an enforceable oral contract properly supported by consideration, we see little merit in the appellants' other arguments challenging the adequacy of proof of various elements necessary for Biggins to make out his wrongful discharge claim. The defendants insist that the promise of stock was ambiguous as to the time of its delivery and that any "compensation" due Biggins was "future" rather than "past" earnings -- and therefore not properly recoverable under the *Fortune* doctrine. This argument is without merit. If Biggins was promised stock in 1984 sufficient to raise his overall annual compensation to $100,000, the jury had ample evidence to determine that his discharge from Hazen Paper Company in 1986, without delivery of the promised stock, was a deprivation of "past" earnings. Equally lacking in merit is appellants' argument that Biggins' discharge in 1986 did not directly cause him to forfeit the promised stock. We can see no distinction between the situation of an employee whose discharge is intended by his employer to deprive him of previously earned wages or sales commissions, and that of an employee discharged by his employer in order to deprive him of stock promised as supplemental annual compensation. A jury could in both instances find that this discharge was "contrived to despoil an employee of earned commission or similar compensation due for past services . . . . *Tenedios*, 479 N.E.2d at 726 (citations omitted)."

B. *Common Law Fraud*

Defendants next attack the sufficiency of the evidence supporting the jury's verdict awarding $315,098 in damages on Biggins' claim of common law fraud. The defendants contend that the district court improperly denied its motions for directed verdict and j.n.o.v. because the evidence did not sufficiently establish certain of the elements necessary to sustain a fraud claim under Massachusetts law. As we observed in one such case under Massachusetts common law,

> the standard for setting aside a jury verdict is a rigorous one. . . . [W]e must find that no jury could reasonably find that all five elements of common law fraud were met with respect to the alleged misrepresentation and omissions. These elements are: (1) that the statement was knowingly false; (2) that [the defendant] made the false statement with intent to deceive; (3) that the statement was material to the plaintiffs' decision to [enter] the contract; (4) that the plaintiffs reasonably relied on the statement; and (5) that the plaintiffs were injured as a result of their reliance.

Turner v. *Johnson & Johnson*, 809 F.2d 90, 95 (1st Cir. 1986).

The defendants' principal contention on appeal is that the evidence was not sufficient to establish that Biggins relied on the stock promise to his detriment and thereby suffered damages as a result of his remaining as an employee at Hazen Paper.[6] The defendants insist that Biggins offered no evidence to show that he gave up other employment opportunities as a result of the promise of the stock, or that he remained Hazen Paper after 1984 *because* of the promise. The defendants also challenge the district court's denial of j.n.o.v. on their argument that the detrimental reliance element was lacking. They argue that the district court misconstrued Massachusetts law when it held that Biggins had satisfied the detrimental reliance element by the simple fact of his remaining as an employee of the company subsequent to the stock promise.

Proof of detrimental reliance is a necessary element of a fraud claim under Massachusetts law. *See McEvoy Travel Bureau, Inc.* v. *Norton Co.*, 408 Mass. 704, 563 N.E.2d 188, 192 (1990) (citing *Barrett Assocs., Inc.* v. *Aronson*, 346 Mass. 150, 152, 190 N.E.2d 867 (1963)); *Robertson* v. *Gaston Snow Ely Bartlett*,

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[6] The defendants also challenge the adequacy of the fraud claim with an argument not raised in either of their motions for directed verdict and j.n.o.v. in the district court. They now claim that Thomas Hazen did not make a false promise of stock to Biggins with the present intention not to fulfill that promise. Appellants waived this argument through their failure to present it to the district court. *See Boston Celtics Ltd. Partnership*, 908 F.2d at 1045.

404 Mass. 515, 536 N.E.2d 344, 349, *cert. denied*, 493 U.S. 894 (1989); *Snyder* v. *Sperry & Hutchinson Co.*, 368 Mass. 433, 333 N.E.2d 4211 428 (1975); *Schinkel* v. *Maxi-Holding, Inc.*, 30 Mass. App. Ct. 41, 565 N.E.2d 1219, 1224, *review denied*, 409 Mass. 1104, 569 N.E.2d 832 (1991). At the outset, we note that we agree with the district court's conclusion that Biggins could not have suffered "detriment" as a result of a loss of rights to the formula under the terms of a stock agreement with the defendants. Because the jury found that Biggins never in fact owned the formula, he cannot assert that he relied on Thomas Hazen's stock promise to his detriment when he gave up various offers to sell the rights to that formula abroad.[7] Thus, in order for the jury to have properly reached its finding of fraud by the defendants, it must be shown there was other evidence legally sufficient to establish Biggins' detrimental reliance.

The district court's denial of j.n.o.v. rested on the finding that Biggins' "rendition of present and continuing services at Hazen Paper Company provide[d] the legal detriment for the fraud claim." That conclusion, in turn, relied on the assumption that under Massachusetts law, Biggins' continued services "in exchange for the stock promise [was] sufficient to provide 'detrimental reliance.'" After review of the applicable case law, we hold that the district court correctly interpreted Massachusetts law when it concluded that under the circumstances Biggins' continued employment was a legally sufficient form of detrimental reliance that could have supported the jury's verdict.

Massachusetts law recognizes that an affirmative act by the victim of fraudulent conduct is not required to establish the element of detrimental reliance:

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[7] In any case, the record does not support Biggins' repeated insistence that the jury was presented with evidence showing that he gave up a specific opportunity to sell the rights to the formula after the alleged stock-for-rights agreement with Hazen in 1984.

> It is the settled law of this Commonwealth in actions for deceit . . . that the representations need not be the sole or predominating motive that induced the victim to part with his money or property, but that it is enough if they alone or with other causes materially influenced him *to take the particular action that the wrongdoer intended he should take as a result of such representations and that otherwise he would not have taken such action.*

National Shawmut Bank v. *Johnson*, 317 Mass. 485, 58 N.E.2d 849, 852 (1945) (citations omitted and emphasis added). *See also* 14A D. Simpson & H. Alperin, Massachusetts Practice: Summary of Basic Law § 1795 (1974) (reliance can be shown where the victim of fraud "does not do what he had intended and started to do and would have done save for the fraud practiced upon him"); Restatement (Second) of Torts § 531 (1977) ("[O]ne who makes a fraudulent misrepresentation is subject to liability to the person[] . . . whom he intends or has reason to expect to act or refrain from action in reliance upon the misrepresentation...."). In a situation in which the object of an employer's fraud is to prevent an employee from leaving his job, we do not think that an employee's fraud claim fails as a matter of law because the employee does not offer evidence of specific instances in which alternative offers of employment were rejected on the strength of the employer's fraudulent promises.[8]

[8] We think that *Davis* v. *Sweetheart Plastics, Inc.*, 635 F. Supp. 849 (D. Mass. 1986), does not properly characterize the principle of detrimental reliance. Appellants urge that we apply the *Davis* court's reasoning that detrimental reliance cannot be established where the defendant fails to adduce evidence that "concrete job offers were made or interviews held." *Id.* at 850. The appellants read this case as holding that a plaintiff who remains in his job on account of his employer's false promise of future benefits, without taking any steps to secure alternative employment, is thereby barred from asserting detrimental reliance. This cannot be correct. When an employer wishes to secure an employee's continued service through false promises of benefits, it is his precise intention to deter the employee from seeking alternative employment. To apply the *Davis* court's rationale would be to accept the perverse proposition that only those employees who see through their employers' fraudulent promises of benefits — and therefore take steps to find alternative employment — can ever show detrimental reliance.

Here, as discussed *supra*, the jury could properly have found that Biggins and the defendants entered into an enforceable agreement for the payment of stock compensation. Both employer and employee were therefore subject to a requirement that "parties to contracts, whether experienced in business or not, should deal with each other honestly, and . . . should not be permitted to engage in fraud to induce the contract." *McEvoy Travel Bureau*, 563 N.E.2d at 194 (citations omitted). We think that it would defeat this principle to require as a matter of law that an employee offer proof of missed employment opportunities in a fraud claim against an employer whose very purpose was to secure the employee's forbearance from seeking alternative employment. We thus reject the appellants' contention that Biggins' proof of the element of detrimental reliance fails as a matter of law.

The jury heard evidence that Biggins approached Thomas Hazen in 1984 with a demand for additional compensation that would raise his salary to an annual rate of $100,000. The jury could have inferred that this demand was an implicit threat by Biggins that he would not otherwise continue in his job. There was further evidence to support the conclusion that as a result of a promise of stock, Biggins remained at the company and referred to his son certain business opportunities that became available to him. A jury could have determined that Biggins, who was fifty-nine years old at the time of the stock agreement, decided as a result of the promise of stock to forego any attempt to seek alternative (or independent) employment during the remainder of his career. The jury could have found damages for this forbearance based on the difference between Biggins' salary and the promised stock compensation that would have raised his annual salary to $100,000.

Based on this evidence and our reading of Massachusetts law, we conclude that the district court correctly denied the defendants' directed verdict and j.n.o.v. motions.

C. *Breach of Contract*

Defendants' next attack on the jury's verdict focusses on the sufficiency of the evidence to sustain Biggins' claim that the defendants breached a contract embodied in the Hazen Paper Company's 1980 Employee Handbook. The jury found that either an express or implied employment contract existed between Biggins and the Hazen Paper Company. It also found that the Employee Handbook constituted a part of this contract and that this contract was breached at the time of Biggins' termination. The jury awarded compensatory damages of $266,897. The district court subsequently denied directed verdict and j.n.o.v. motions that challenged both the sufficiency of the evidence establishing the existence of a contract other than at-will employment and the sufficiency of proof of damages flowing from the breach of that contract.

The parties agree that the controlling authority under Massachusetts law is *Jackson* v. *Action for Boston Community Development, Inc.*, 403 Mass. 8, 525 N.E.2d 411 (1988). In *Jackson*, the Massachusetts Supreme Judicial Court established that the existence of an express or implied employment contract was a factual issue to be determined under the circumstances of the case, 525 N.E.2d at 413-14, and that, "on proper proof, a personnel manual can be shown to form the basis of [such] an express or implied contract." *Id.* at 414. In *Jackson*, however, the Supreme Judicial Court found summary judgment appropriate against the plaintiff alleging breach of a contract embodied in an employment manual:

> In this case. . . . the most that can be said in his behalf is that he received the manual at some unknown time and continued to work for the defendant thereafter . . . .
>
> . . . .
>
> [O]n review of all the circumstances here, . . . the conclusion is inexorable that no implied contract based on the personnel manual's terms existed. It is undisputed that the

> defendant retained the right to modify unilaterally the personnel manual's terms. This tends to show that any "offer" made by the defendant in distributing the manual was illusory. The personnel manual's language that it is provided for "guidance" as to the defendant's "policies" is of the same import. It is also significant that nothing in the circumstances here reveals any negotiation over the terms of the personnel manual. Furthermore, consistent with employment at will, no term of employment was stated in the personnel manual. The plaintiff does not argue that any special attention was called to the manual by the defendant; there is no indication that the plaintiff signed the manual, or in any way manifested his assent to it or acknowledged that he understood its terms.

Id. at 415-16 (citations omitted). This means, as we understand it, that an employer does not automatically enter into a contract other than at-will employment with its employees by merely distributing a personnel manual to them. Instead, *Jackson* requires that a plaintiff establish all of the elements ordinarily necessary for the formation of a contract in order to prove that a personnel manual forms the basis of an express or implied employment contract.

The evidence showed that Biggins was hired by Hazen Paper in 1977. Biggins testified that at some point thereafter he acquired a copy of the company's 1980 Employee Handbook. Biggins stated that he tried to take a vacation in May of 1986, a month prior to his discharge from the company, but was refused permission by Thomas Hazen. He testified that after his termination the company refused to pay him for other accrued vacation time. Biggins said that he understood that the company had a policy of not paying employees for vacation time off, and that he learned of this policy from the 1980 Employee Handbook. He also declared that he had learned about this policy from a letter sent him after his termination by Hazen Paper's attorney, in which Biggins thought the attorney had quoted "verbatim"

those portions of the Employee Handbook that described Hazen Paper's vacation policy.

The 1980 Employee Handbook established other personnel policies apart from the vacation policy. As part of a section entitled "The Policies You Enjoy as an Employee of Hazen Paper Company," the Handbook specified that employees would have to pass through a ninety day "get-acquainted period" in order to become "regular" employees. In a subsection titled "Job Security," the Handbook provided that

> When employees do not fulfill the Company's standards, they are counselled and told how to be an acceptable employee. Only those who jeopardize customer relations through outlandish gross violations of standards or failure to respond to repeated counselling are separated.

On the topic of discipline of employees, the Handbook had a section entitled "What is expected of you as an employee of Hazen Paper Company," which provided that

> when discipline becomes necessary because of a violation of Hazen Paper Company's rules, we have the responsibility to ensure that such discipline is fair and consistent. To provide for this treatment, the following factors will be considered:
>
> 1) The seriousness of the offense;
> 2) The circumstances surrounding the incident;
> 3) Our past record;
> 4) The Company's past practice.
>
> Generally, any discipline will start with a verbal warning, then a more serious penalty of suspension or discharge if the conduct does not change. For very serious matters, employees may be discharged without warning.

These policies, and the surrounding circumstances of Biggins' termination, formed the basis of the jury's finding that (1) the 1980 Employee Handbook established a contract between Hazen Paper and Biggins of other than at-will employment, and (2) that Biggins' termination in 1986 breached the contract embodied in the Handbook because the company failed to follow the procedures specified in the Handbook governing employee counselling and "discipline."

Viewing the evidence in the light most favorable to Biggins, we are nonetheless compelled to hold that the district court erred in denying the defendants' motion for j.n.o.v. After reviewing the various principles of contract formation specifically enumerated by the *Jackson* court as being necessary to establish the existence of a contract other than at-will employment, we find the evidence lacking in two important respects.

First, in affirming a grant of *summary* judgment against an employee, *Jackson* held that it was "significant that nothing in the circumstances here reveal(ed) any negotiation over the terms of the personnel manual." *Jackson*, 525 N.E.2d at 415. In this case, there was no evidence to support a finding that there was "negotiation" between Biggins and Hazen Paper which in any way implied that the 1980 Employee Handbook ever formed a part of Biggins' conditions of employment between 1977 and his termination in June of 1986. Indeed, the evidence showed that the only time the terms of the 1980 Employee Handbook were discussed with Biggins was *after* his discharge from the company. Biggins argues that such "negotiations" took place in the context of the 1984 promise of stock compensation, but offered no evidence at trial that the Employee Handbook was mentioned by him or Thomas Hazen during that meeting.

Second, there was no showing that prior to Biggins' termination that "special attention was called to the manual by the defendant . . . [and] no indication that the plaintiff signed the manual, or in any way manifested his assent to it or acknowledged that he understood its terms." *Jackson*, 525 N.E.2d at 416. In this respect, the fact that the Employee Handbook

relied upon by Biggins was issued by his employer three years after he joined Hazen Paper in 1977 helps explain why Biggins was unable to offer evidence showing that he was called upon to sign the Handbook or otherwise manifest assent to its terms. There was simply no evidence upon which the jury could have made the determination that prior to Biggins' discharge "special attention was called" to him by Hazen Paper about the 1980 Employee Handbook.

The most that can be said here is that after Biggins' termination, Hazen Paper refused to pay him for his accrued vacation time on the basis of language in the Employee Handbook. Biggins, in turn, attempted to hold the defendants to the standards of behavior provided in other portions of that manual. We do not think that under Massachusetts law a jury would be permitted to find that the 1980 Employee Handbook established an implied or express contract of other than at-will employment with Biggins. Consequently, since such an employment contract did not exist at the time of Biggins termination, there could have been no breach.

Even if we concede that Biggins satisfied some of the elements of contract formation required by *Jackson*,[9] we think that his

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[9] The evidence is inconclusive, at best, to establish some of the other elements required by the *Jackson* court. For example, in rejecting the plaintiff's claim of an implied contract, the Supreme Judicial Court placed particular reliance on the fact that the defendant expressly retained the right to modify unilaterally the personnel manual's terms. *Jackson*, 525 N.E.2d at 415. In the instant case, there was no comparable reservation of rights. Biggins concludes that the absence of a reservation of rights of modification is proof in its favor of an implied contract. The defendants naturally take the opposite view that there "was no evidence that Hazen Paper ever gave up the right to modify its own personnel policies."

The *Jackson* court offered no bright-line standards as to how "clear an indication an employer must give in connection with distributing an employee manual before it may be found that the employer entered into a contact on other than a strictly at-will basis." *Id*. *Jackson* nonetheless places the burden on the employee to prove the existence of the formation of a contract. In this case, there was no express reservation of a right of modification by Hazen Paper. We think that Massachusetts courts would probably not consider the mere fact of the absence of such a reservation adequate evidence to support

failure to adduce evidence to support at least two of the principal elements of that inquiry was fatal to his claim. Under these circumstances, the district court was required to grant j.n.o.v. Where there was no employment contract other than at-will established or implied under the 1980 personnel manual, the jury's award of damages must be vacated.

D. *Massachusetts Civil Rights Act*

On cross-appeal, Biggins challenges the district court's grant of j.n.o.v. reversing the jury's award of one dollar in compensatory damages for violation of the Massachusetts Civil Rights Act. Mass. Gen. L. ch. 12, § 11H & 11I.[10] To recover under these provisions, a plaintiff must prove that

> (1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by "threats, intimidation or coercion."

Bally v. *Northeastern Univ.*, 403 Mass. 713, 532 N.E.2d 49, 51-52 (1989) (quoting Mass. Gen. L. ch. 12, § 11H). Applying

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an employee's claim of the formation of a contract other than at-will employment. We also note that we have previously resolved in favor of the employer ambiguities created by the silence of an employment manual on the issue of whether that manual constitutes part of an employment contract. *See Menard*, 848 F.2d at 289-90 (pre-*Jackson* decision under Massachusetts law affirming summary judgment against employee on implied contract claim where there was no evidence showing that personnel manual applied to that employee).

[10] Mass. Gen. L. ch. 12, § 11H provides in pertinent part that

> Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or . . . commonwealth, the attorney general may bring a civil action. . . .

Mass. Gen. L. ch. 12, § 11I creates a private right of action for persons whose rights have been "interfered with" in the manner proscribed by section 11H.

this test to Biggins' claim, the district court conceded that there might have been an interference with "rights" within the meaning of the Civil Rights Act as a result of the failure of Hazen Paper to deliver the promised stock compensation. The court nonetheless concluded that Biggins had failed to offer adequate evidence to support a claim under the Civil Rights Act because he had not demonstrated that the defendants used *physical* "threats, intimidation or coercion" to accomplish this deprivation.

On appeal, Biggins insists that the district court too narrowly construed the meaning of "threats, intimidation or coercion" when it found Biggins' case distinguishable from "most [Civil Rights Act] cases recognized by the Supreme Judicial Court [which] involve the threat of physical contact." Biggins argues that the district court erred because it required proof of a threat of physical harm.

In *Bally*, the Massachusetts Supreme Judicial Court noted that almost all of the cases in which it had granted relief under the Civil Rights Act involved "a physical confrontation accompanied by a threat of harm." *Id.* at 52. The *Bally* court acknowledged that it thought the sole exception to this requirement of physical confrontation as an element of a Civil Rights Act claim was *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 502 N.E.2d 1375 (1987). There, according to the *Bally* court, in a case involving the deprivation of the plaintiff's contract rights, the Supreme Judicial Court found "that the Boston Symphony orchestra violated (the Civil Rights Act) because its cancellation of its contract with Redgrave had the effect, intended or otherwise, desired or not, of coercing Redgrave not to exercise her First Amendment rights." *Id.* at 52. Biggins asserts that his case is analogous to *Redgrave*, insofar as he too suffered a deprivation of his contractual rights to his stock compensation as a result of the non-physical form of "intimidation" to which he was subjected at the time of his termination from Hazen Paper.

We agree with the district court that j.n.o.v. was appropri-

ate. In the *Redgrave* decision, the Supreme Judicial Court found that a deprivation of Redgrave's contract rights could have been caused by "threats, intimidation and coercion" — specifically, threats to the safety of the audience and members of the Boston Symphony Orchestra made by community members and subscribers after the announcement of Redgrave's planned performance. *See Redgrave*, 502 N.E.2d at 1376-79. The *Redgrave* court found that physical threats by these third parties could have caused the BSO to cancel Redgrave's performance contract, depriving her of both her contract and First Amendment rights. *Id.* The *Redgrave* court thereby inferred the existence of physical "threats, intimidation, or coercion" sufficient to state a claim under the Civil Rights Act.

Biggins did not offer evidence that showed that, as in *Redgrave*, the deprivation of his contract or constitutional rights was caused by indirect physical "threats, intimidation or coercion." We therefore see little reason to deviate from the Supreme Judicial Court's repeated pronouncement that a defendant can be held liable under the Civil Rights Act only in situations that "involve[] an actual or potential physical confrontation accompanied by a threat of harm." *Layne* v. *Superintendent, Massachusetts Correctional Inst.*, 406 Mass. 156, 546 N.E.2d 166, 168 (1989) (citing *Bally*). *See also Willitts* v. *Roman Catholic Archbishop*, 411 Mass. 202, 1991 Mass. LEXIS 533, *15-16 (Nov. 18, 1991) ("relief under the Act may be granted where the 'threat, intimidation or coercion' involves. . . a physical confrontation accompanied by a threat of harm. . . . ") (citations omitted); *Longval* v. *Commissioner of Correction*, 404 Mass. 325, 535 N.E.2d 588, 593 (1989) (same principle) . If *Redgrave* states an exception to this principle, that exception is not applicable under the facts of this case. We therefore affirm the district court's grant of j.n.o.v.; the jury's one dollar damages award is annulled.

V. PREJUDGMENT INTEREST

The district court awarded prejudgment interest "on the entire award." In *Powers* v. *Grinnell Corp.*, 915 F.2d 34 (1st Cir. 1990), the role of prejudgment interest was fully explored where liquidated damages had been awarded on an ADEA claim and there had been recovery on state law claims paralleling the ADEA claim.[11] We focused on whether the ruling in *Thurston* that liquidated damages under ADEA was punitive, 469 U.S. at 125, should change our circuit rule "that an award of liquidated damages bars prejudgment interest in ADEA cases." *Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982). After a detailed examination and analysis of *Thurston* and cases in other circuits, we concluded "that *Thurston* does not ordain abandonment of the majority rule that an award of liquidated damages under the ADEA precludes a recovery of prejudgment interest on the back pay award." *Powers*, 915 F.2d at 41 (citations omitted). We also held, following *Kolb* and *Linn* v. *Andover Newton Theological School, Inc.*, 874 F.2d 1, 8 (1st Cir. 1989), that a plaintiff cannot recover both prejudgment interest on a back pay award under a state law claim and liquidated damages on an ADEA claim. *Powers*, 915 F.2d at 42. We are, of course, bound by the *Powers* holding. Therefore there can be no prejudgment interest on the ADEA damages award.

Although *Powers* would also preclude prejudgment interest on the state law claim of breach of the employment contract, our reversal of the district court's ruling on that claim and annulment of the damages renders this issue moot.

The state law claim based on fraud, however, stands on a different footing. This was not a claim for the back pay and lost employment benefits encompassed within the ADEA count. The fraud count in the complaint was premised on a promise by the defendants that "they would pay him [plaintiff] in addition to his regular salary corporate stock of a value which would increase his annual compensation to $100,000." The

[11] The state law claims were brought under the Rhode Island Fair Employment Practices Act.

jury was instructed properly on each count of the complaint. The only instruction that referred directly to the stock promise was on the fraud count: "The next count is fraud or deceit. Plaintiff also alleges that Defendants committed fraud or deceit by promising to give Plaintiff stock but never delivering the stock." The court then went on to instruct the jury carefully and properly on the proof necessary for a finding of fraud under Massachusetts common law. The jury was further instructed not to award duplicative damages: "In awarding damages, you should be careful not to award duplicative damages; that is, Plaintiff is entitled to collect full compensation for his injuries, but he must not collect more than once for the same wrong."

An analysis of the jury's awards on the fraud and ADEA counts shows that its award for fraud was not duplicative of its award on the ADEA count. The jury awarded plaintiff $315,000 on the fraud claim. The plaintiff's damages evidence on this count was that the stock loss amounted to $342,498. The jury award of $315,000 was a rough approximation of the plaintiff's evidence. On the ADEA count, the jury awarded plaintiff $560,775. As already pointed out, this was $141,320.62 more than the plaintiff's losses in salary, employment benefits and bonus. It is, however, a far cry from the stock loss of $342,000.

We see no reason why prejudgment interest should not be allowed on a state law claim that is, as here, separate and distinct from the ADEA claim. This was well within the district court's discretion. *See Freeman* v. *Package Machinery Co.*, 865 F.2d 1331, 1343 (1st Cir. 1988). This result also comports with our decision in *Freeman* in other respects. There, we observed that "a plaintiff is entitled to only one full recovery, no matter how many legal grounds may support the verdict," *id.* at 1345, and that the "plaintiff, although entitled to the same damages under both federal and state statutes, could collect them but once." *Id.* at 1344, n.7. *See also Linn*, 874 F.2d at 8. Here, the plaintiff has recovered the value of the stock promised him under his common law fraud claim, and not under his ADEA claim. There is, therefore, no duplication of damages.

We now turn to the ERISA damages award. We have been unable to find any cases discussing whether or how an award of liquidated damages under an ADEA claim affects the addition of prejudgment interest to ERISA damages. We do know, however, that "[a]s a matter of federal law, prejudgment interest is a discretionary item of compensation." *Conway* v. *Electro Switch Corp.*, 825 F.2d 593, 602 (1st Cir. 1987). *See also Kolb*, 694 F.2d at 875.

In *West Virginia* v. *United States*, 479 U.S. 305 (1987), the question was whether West Virginia was liable for prejudgment interest on a debt owed the United States Army Corps of Engineers. *Id.* at 306. A unanimous court found that it was. In the course of its opinion, the Court stated: "Prejudgment interest is an element of complete compensation . . . ." *Id.* at 310 (citing *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 655-656, & n.10 (1983)). The Seventh Circuit has taken the position that prejudgment interest should be presumptively available to victims of federal law violations and that this presumption is specifically applicable to ERISA cases. *See Rivera* v. *Benefit Trust Life Ins. Co.*, 921 F.2d 692, 696 (7th Cir. 1991). We need not go that far at this time. The question is whether the prejudgment interest award was within the discretion of the district court. We find that it was.

As with the state law fraud claim, the ERISA award did not duplicate the ADEA award. It was not based on loss of back pay and other employment benefits due and owing at the time plaintiff was discharged. In awarding damages on the ERISA count, the jury found that "defendants fired plaintiff for the purpose of preventing plaintiff from attaining vestment of pension benefits, in violation of ERISA." We have already found that the jury verdict on this count had a solid evidentiary foundation. Defendants argue that because the pension rights would not be payable until 1994, prejudgment interest cannot be awarded. This overlooks the obvious fact that the plaintiff has been damaged now because defendants took away pension

benefits by firing him before his rights to the pension could vest. We affirm the award of prejudgment interest on the ERISA damages.

VI. ATTORNEY'S FEES

After trial, Biggins moved that he be awarded attorney's fees under the ADEA count, the ERISA count, and the Massachusetts Civil Rights Act count in the amount of $666,729.12. This amount represented one-third of the total jury verdict of $2,000,187.35. In its memorandum opinion and order on the post-trial motion, the district court reduced the ADEA award by one-half and found, as a matter of law, that plaintiff was not entitled to liquidated damages. It seems apparent that, regardless of the numbers, plaintiff sought an enhancement of attorney's fees equal to one-third of the final judgment on damages. This is borne out by an affidavit of plaintiff's counsel submitted in support of its motion for attorney's fees.

This affidavit stated, *inter alia*, that the case was handled on a one-third contingent fee basis with the plaintiff responsible for the expenses incurred; and that in the legal market for the geographic area in which plaintiff's counsel practices — Springfield, Massachusetts — a one-third contingent fee agreement is the typical method of compensation for attorneys representing plaintiffs on employment-related litigation.[12] The chief counsel for the plaintiff stated:

> I agreed to accept this case on a contingent fee basis, even with the knowledge that this would be a long and complicated case, because I knew this was the only way to provide access to the Courts for Mr. Biggins, and because our risk taking had the potential for reward if successful with a premium in excess of our normal hourly rates. If the

[12] There were affidavits by two other attorneys from the same legal market area to the same effect.

> Court's award of attorneys' fees is limited to payment for hours expended multiplied by our normal hourly rates, then I would be discouraged from taking these types of cases in the future when I could be spending my time on cases where I would be paid without risk of non-payment according to my normal hourly rate.

Plaintiff's counsel also submitted detailed records of the time spent by the attorneys and paralegals on the case and a fee computation based on this and the hourly rates charged by the different attorneys who worked on the case. The total legal fees, as determined by the time expended multiplied by hourly rates, came to $182,058.25. The district court adjusted this fee slightly to reduce the hourly payment rates on work performed by experienced attorneys on "non-core" matters. The court arrived at a lodestar fee in the amount of $175,564.57. Biggins does not appeal the court's determination of the lodestar fee award.

The district court refused, however, to enhance the lodestar fee award to an amount equivalent to one-third of the total damages awarded. Plaintiff appeals the refusal of his request for enhancement of the fee award.

The issue of enhancement of legal fees to reflect the contingency of services -- the risk involved of not getting paid -- was the focus of the Supreme Court's decision in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). In a comment that is pertinent to the case before us, Justice White, writing for a plurality, observed that fee enhancement is not necessary "where any plaintiff, impecunious or otherwise, has a damages case that competent lawyers would take in the absence of fee-shifting statutes." *Id.* at 726. Justice White then stated:

> The issue thus involves damages cases that lawyers would not take, not because they are too risky (the fee-shifting statutes should not encourage such suits to be brought), but because the damages likely to be recovered

> are not sufficient to provide adequate compensation to counsel, as well as those frequent cases in which the goal is to secure injunctive relief to the exclusion of any claim for damages. In both situations, the fee-shifting statutes guarantee reasonable payment for the time and effort expended if the case is won.

Id.

It appears to us that in this case fee enhancement is not warranted. Although the fee contract between plaintiff and his attorneys is not part of the record, it can be fairly inferred from counsel's affidavit that Biggins and his attorneys entered into a fee agreement whereby Biggins agreed to pay his attorneys one-third of the amount of damages awarded and be responsible for expenses. In his affidavit, chief counsel for Biggins stated that "our risk taking had the potential for reward if successful with a premium in excess of our normal hourly rates." On the basis of the adjustment in damages made in this opinion, and without adding prejudgment interest, plaintiff's attorneys are entitled to fees under their contingent fee arrangement of more than twice the amount of the lodestar fee award. Plaintiff's counsel, as he anticipated, will in fact be rewarded with a premium in excess of his normal hourly rates.

The substantial recovery of damages in this case stands in contrast to the situation in a majority of civil rights cases in which the damages are so low that fees based on a contingent fee agreement are less than the lodestar recoverable as attorney's fees. In *Blanchard* v. *Bergeron*, 489 U.S. 87 (1989), the damages award on a § 1983 claim totalled $10,000. The attorneys had a forty percent contingency fee agreement with the plaintiff. The lodestar figure, as determined by the district court, was $7,500. The court of appeals set the fee award aside on the ground that the contingent fee agreement was a cap on the fees to be awarded. Justice White, writing for the Court, reversed this ruling, holding that "[t]he attorney's fee provided for in a contingent-fee agreement is not a ceiling upon the fees

recoverable under section 1988." *Id.* at 96. *Blanchard*, which is typical of the fee cases coming before the courts, is the reverse of the case before us. Under the circumstances of this case, fee enhancement is not necessary because the contingency arrangement more than adequately compensates Biggins' attorneys for the risk undertaken in accepting this case.

This does not mean that a lodestar fee should not be determined. The lodestar fee, which is paid by the defendant, acts as a deterrent to future violations of the ADEA. As the *Blanchard* Court pointed out, "[t]he defendant is not, however, required to pay the amount called for in a contingent fee contract if it is more than a reasonable fee calculated in the usual way." *Id.* at 944. We would expect, of course, that the lodestar fee as determined by the district court will be an offset against the fee to be paid by the plaintiff under the one-third contingent fee agreement.

CONCLUSION

1. We uphold the finding of liability on the ADEA count. We find, as a matter of law, that the violation was willful. The damages are reduced from $560,775 to $419,454.38. Because this was a willful violation that amount is doubled to $838,908.76.
2. We uphold the finding of liability on the ERISA count. We order a remittitur of $7,000 on the damages award of $100,000.
3. We uphold the finding of liability on the wrongful discharge count. We leave undisturbed the award of one dollar in damages.
4. We uphold the finding of liability on the fraud count and affirm the damages award of $315,098.
5. We reverse the finding of liability on the breach of employment contract count. The damages award on that count of $266,897 is annulled.

6. We affirm the district court's grant of j.n.o.v. on the Massachusetts Civil Rights Act count. This means the jury award of one dollar in damages is annulled.
7. No prejudgment interest can be awarded on the ADEA count. We uphold the awards of prejudgment interest on the ERISA count and the wrongful discharge and fraud counts.
8. We affirm the district court's refusal to enhance plaintiff's attorney's fees.

Affirmed in part, reversed in part. Remanded for further proceedings consistent herewith.

No costs to either party.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 88-0025-F

WALTER F. BIGGINS,
PLAINTIFF,
v.
THE HAZEN PAPER COMPANY,
ROBERT HAZEN AND
THOMAS HAZEN,
DEFENDANTS.

MEMORANDUM AND ORDER

April 5, 1991

FREEDMAN, C.J.

I. INTRODUCTION

On February 16, 1986, plaintiff Walter P. Biggins commenced this action against defendants Hazen Paper Company, Robert Hazen and Thomas Hazen ("defendants" or "the Hazens"), alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), Massachusetts tort and contract law, and the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, §§ 11H, 11I ("MCRA"). A jury found in favor of plaintiff on six of the eight counts in his complaint, and awarded plaintiff substantial damages. After the verdict, both parties submitted post-trial motions.

Four motions, two by plaintiff and two by defendants, are now before the Court. First, defendants have filed a

motion, pursuant to Fed. R. Civ. P. 50(b), for judgment notwithstanding the verdict or, in the alternative, for a new trial. Second, defendants have filed a motion to amend or alter the judgment pursuant to Fed. R. Civ. P. 59(e). Plaintiff opposes these motions.

Third, plaintiff has moved for an award of costs and attorney's fees under provisions of federal and state law. Fourth, plaintiff has filed a motion to compel defendants to increase the amount of the bond that secures plaintiff's judgment during the pendency of the post-trial motions. Defendants oppose plaintiff's motions.

For the reasons stated below, the Court orders judgment notwithstanding the verdict with regard to liquidated damages and the MCRA claim. The Court denies defendants' motion for judgment notwithstanding the verdict or new trial in all other respects. The Court also denies defendants' motion to alter or amend the judgment. The Court grants plaintiff's motion for attorneys' fees in the amount of $175,564.75, and for costs in the amount of $9,760.07. Finally, the Court denies plaintiff's motion to increase the amount of the bond.

II. PRIOR PROCEEDINGS

On July 20, 1990, after one week of trial, a jury of six returned a verdict in favor of plaintiff on six of the eight counts at issue.[1] On Count I, the jury awarded plaintiff $560,775.00 in actual damages under the ADEA, and also found that defendants had wilfully violated the ADEA. On Count II, the jury found that defendants' conduct constituted a violation of ERISA, and awarded $100,000.00 in damages. The jury also awarded plaintiff $1.00 in damages on Count IV for wrongful discharge, $315,098.00 on Count V for fraud, $1.00 on Count VII for a

[1] The jury found in favor of defendants on Counts III (declaratory judgment) and VI (conversion). Because none of the parties have objected to these parts of the verdict, Counts III and VI are not at issue, and the Court will not discuss them.

violation of MCRA, and $266,897.00 on Count VIII for breach of contract. Thus, the jury awarded plaintiff a total of $1,242,772.00.

Subsequent to the verdict, plaintiff filed a motion for an award of liquidated damages. On August 24, 1990, the Court granted plaintiff's motion, based solely on the jury's finding of willfulness and the text of the ADEA. 29 U.S.C. § 626(b); *Biggins* v. *Hazen Paper Co., et al*, Civ. Action No. 88-0025-F, Memorandum and Order (August 24, 1990). Thus, the Court awarded to plaintiff, in addition to the damages awarded by the jury, liquidated damages in an amount equal to the actual damages awarded by the jury on the ADEA claim, that is, $560,775.00. The Court deliberately offered no opinion as to the weight or sufficiency of the evidence with regard to any of the jury's findings. "[T]he Court will withhold its decision as to sufficiency of the evidence, on the question of willfulness as well as on other portions of the verdict, until after judgment is entered." *Id.* at 3-4.

The Court ordered the clerk to enter judgment consistent with the jury verdict and the Court's decision on the liquidated damages question. *Id.* at 4. On August 27, 1990, the clerk entered judgment in the amount of $1,803,547.00, with interest on the ERISA and state law claims in the sum of $196,641.35. Defendants' total liability as of the date of judgment, therefore, was $2,000,188.35.

The Court ordered the clerk to issue an execution on November 7, 1990. Upon issuance of the execution, defendants filed a bond in the amount of $2,100,000.00 to stay execution of judgment pending the Court's disposition of post-trial motions. Defendants having provided security, plaintiff has refrained from execution pending the Court's determination of the pending motions.

III. DISCUSSION

A. *Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial*

Defendants seek judgment notwithstanding the verdict, or in the alternative, a new trial on each count on which plaintiff prevailed. Fed. R. Civ. P. 50(b). The Court will first address defendants' arguments for judgment notwithstanding the verdict, and then proceed to the new trial arguments.

1. Judgment Notwithstanding the Verdict

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict . . . or by judgment notwithstanding the verdict." *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 479-80 (1943). The Court will grant a party's motion for judgment notwithstanding the verdict only if, viewing evidence and reasonable inferences in a light most favorable to the non-moving party, reasonable people would nonetheless find in the movant's favor. *Jordan* v. *United States Lines, Inc.*, 738 F.2d 48; 49 (1st Cir. 1984)(citations omitted); *accord deMars* v. *Equitable Life Assurance Society*, 610 F.2d 55, 57 (1st Cir. 1979). "This Court will not grant a judgment notwithstanding the verdict unless the jury's verdict is untenable under any reasonable assessment of the evidence adduced at trial." *Refuse & Environmental Systems, Inc.* v. *Industrial Services of America*, 732 F. Supp. 1209, 1222 (D. Mass. 1990)(Freedman, C.J.).

a. Count I: Age Discrimination in Employment

In order to prevail under the ADEA, a plaintiff must prove that his employer fired him because of his age, that is, that plaintiff's age was "the determinative factor in his discharge." *Freeman* v. *Package Machinery Co.*, 865 F.2d 1331; 1335 (1st Cir. 1988); *Loeb* v. *Textron, Inc.*, 600 F.2d 1003; 1019 (1st Cir.

1979). To properly state a claim under the ADEA, a plaintiff must first establish a *prima facie* case of age discrimination. A plaintiff must show that he was within the protected age group; that he was fired; that he was qualified for the position and performed his job adequately; and that he was replaced by a person with qualifications similar to his own, thus evidencing the employer's continued need for the same skills. *Hebert* v. *Mohawk Rubber Co.*, 872 P.2d 1104, 1110 (1st Cir. 1989); *Freeman*, 865 F.2d at 1335.

Proof of plaintiff's *prima facie* case creates an inference of age discrimination, and places on the employer a burden of articulation or production. While the burden of proof remains at all times with the plaintiff, the employer, having been presented with an inference of discrimination, bears the burden of articulating a valid, non-discriminatory reason for the firing. *Freeman*, 848 F.2d at 1335.

If the employer produces a legitimate reason for the firing, "the initial presumption of age discrimination is dissolved and plaintiff must respond by showing that the reasons presented by the defendant are merely pretextural." *Hebert*, 872 F.2d at 1111; *Freeman*, 865 F.2d at 1336. Plaintiff must "prove by a preponderance of the evidence that the defendant's true motive was age discrimination." *Menard* v. *First Security Services Corp.*, 848 F.2d 281, 285 (1st Cir. 1988). Thus, in the end, a plaintiff must prove that the employer's alleged reasons for discharging plaintiff were fictitious and designed merely to mask age discrimination. *Freeman*, 865 F.2d at 1336.

The record plainly indicates that plaintiff established a *prima facie* case, and defendants do not appear to dispute this. Rather, the Hazens contend that they fired plaintiff because of plaintiff's disloyalty and his refusal to sign a legitimate confidentiality agreement. Defendants point to plaintiff's involvement with other businesses competing in the paper industry as evidence of plaintiff's disloyalty. In short, defendants argue that they had a valid, non-discriminatory reason for discharging plaintiff, that the record contains overwhelming evidence

in their favor, and that the jury verdict to the contrary lacks evidentiary support. The Court disagrees, and now holds that plaintiff offered evidence sufficient to sustain his burden of proof under the ADEA. Thus, the jury verdict as to age discrimination must stand.

Plaintiff offered the following as evidence of age discrimination. Plaintiff testified that defendants presented him with a confidentiality agreement, and that plaintiff would have had to sign the agreement in order to keep his job. Trial Transcript, Volume I at 114.[2] Plaintiff alleged that other, younger Hazen Paper employees did not have to sign such an agreement. Plaintiff further testified that the agreement did not provide for severance pay for plaintiff. However, when defendants hired a younger employee, one McDonald, to replace plaintiff, Mr. McDonald was offered a confidentiality agreement that provided for 100 days of separation pay. Further, Mr.McDonald's confidentiality agreement included a six-month noncompetition clause, whereas plaintiff's agreement contained a two-year non-competition clause. 4 Tr. 92 (testimony of Thomas Hazen).

Plaintiff also offered evidence that defendants fired plaintiff in order to prevent plaintiff from acquiring any pension entitlements. While the discharge of an employee in order to eliminate the employee's pension rights cannot, by itself, establish age discrimination, courts have held that such conduct provides some proof of an ADEA violation. *Visser* v. *Packer Engineering Associates, Inc.*, 924 F.2d 655, 658 (7th Cir. 1990); *Benjamin* v. *United Merchants and Manufacturers, Inc.*, 873 F.2d 41, 43 (2d Cir. 1989). It is undisputed that a Hazen Paper employee acquires vested rights to pension benefits after having worked for Hazen for ten years. Plaintiff testified that at the time of his discharge, he "was just a few hours away from being fully vested" in the pension plans offered by Hazen Paper Company. 1 Tr. 128. Thomas Hazen was in charge of pension account matters

[2] The trail transcript comes in six volumes. The Court will cite the trial transcript by volume number and page. For example, the Court would cite to page 25 of volume 2 as follows: 2 Tr. 25.

at Hazen Paper Company, and regularly received pension account documents regarding individual employee pension status. 4 Tr. 94-95. Thomas Hazen testified that at the time of plaintiff's termination, plaintiff had nine years and several months of service at Hazen Paper Company. 4 Tr. 97-98. While Thomas Hazen denied discharging plaintiff to prevent his pension rights from vesting, the jury could reasonably have found that defendants knew of plaintiff's status as to the pension fund, and chose to discharge him with the intent to interfere with his pension rights.

Plaintiff testified that the Hazens also made comments with regard to plaintiff's age. On the first day of trial, plaintiff testified that Thomas Hazen had stated that "it was costing him a lot more for my [insurance] policy because I was so old." 1Tr.151. According to plaintiff, Robert Hazen had also mentioned that the Hazen's handball court membership would not be useful for plaintiff because of plaintiff's age. 1 Tr. 151.

The jury also heard evidence regarding defendants' offer of a consulting arrangement to plaintiff. Thomas Hazen testified that in May of 1986, before plaintiff was fired, he offered plaintiff a consulting contract. Thomas Hazen testified that persons employed by Hazen Paper as consultants did not accrue employee benefits: no vacation benefits, pension rights, or health or disability insurance. 4 Tr. 106-107. From this testimony, the jury could reasonably have concluded that defendants sought to receive plaintiff's services, but did not wish to extend to plaintiff certain benefits that were offered to younger employees.

While the Court finds this evidence of age discrimination a bit thin, the evidence is sufficient to support the jury's verdict. A judge may not grant judgment notwithstanding the verdict simply because he would have reached a different conclusion had he been the trier of fact. *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978). Rather, judgment notwithstanding the verdict is appropriate only where the evidence can reasonably lead to only one conclusion. Because the Court finds that the jury could have reasonably found age discrimination,

based on the evidence adduced at trial and reasonable inferences drawn therefrom, the verdict as to age discrimination will stand.

b. Liquidated Damages: The Question of Willfulness

On the issue of willfulness, however, the Court finds the evidence deficient. In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), the Supreme Court, adopting a Second Circuit definition, held that a violation of ADEA is willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 126, *citing Air Line Pilots Ass'n, International* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983), *aff'd in part and rev'd in part, Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985).[3] In adopting the "knew or showed reckless disregard" standard, the Supreme Court explicitly rejected the notion that a willful violation exists where "the employer simply knew of the potential applicability of the ADEA," *Thurston*, 469 U.S. at 127, or where the employer merely knew that the ADEA was "in the picture." *Id.*, *citing Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert.*

[3] Prior to *Thurston*, the First Circuit in *Loeb* held that a violation of the ADEA is willful if "done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." 600 F.2d at 1020, n. 27, *quoting* E.Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977). In *Thurston*, however, the Supreme Court adopted the "knew or showed reckless disregard" standard for willfulness in ADEA cases. The Supreme Court further stated that "[w]e do not agree with TWA's argument that unless it intended to violate the Act, double damages are inappropriate under § 7(b) of the ADEA. Only one Court of Appeals has expressed approval of this position. *See Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1020, n. 27 (1st Cir. 1979)." *Thurston*, 469 U.S. at 126 n. 19.

While the First Circuit has not expressly overturned *Loeb* with respect to the standard for determining willfulness,, the First Circuit has applied *Thurston*, without reference to *Loeb*, when deciding the question of willfulness under the ADEA. *Aledo-Garcia* v. *Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354, 357 (lst Cir. 1989). Thus, the Court finds that the language of *Thurston* operates to overrule *Loeb* with respect to the standard of willfulness that applies in ADEA cases.

denied, 409 U.S. 948 (1972). The Supreme Court rejected these proposed standards because they "would result in an award of double damages in almost every case." *Thurston*, 469 U.S. at 128. "Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) [29 U.S.C. § 626(b)] in a manner that frustrates this intent." *Id.*

It is with some difficulty that the Court applies the "knew or showed reckless disregard" standard to the facts of the instant case. In *Thurston*, Trans World Airlines ("TWA") adopted a policy which allowed airplane captains who were disqualified from serving as captains for reasons not related to age (e.g., medical incapacity) to transfer to positions as flight engineers. However, those captains over the age of sixty could not automatically transfer. Any captain aged sixty years or more could transfer to flight engineer status only if he successfully bid for flight engineer status pursuant to a collective bargaining agreement. The Supreme Court held that the policy discriminated against protected pilots in violation of the ADEA. However, the Court held that the violation was not willful because TWA made good faith efforts to fashion a policy in compliance with the ADEA.

In cases like *Thurston*, which involve employment policies or employment plans, the "knew or showed reckless disregard" standard functions adequately because it penalizes employers who institute discriminatory policies that they know violate that ADEA, or that indicate the employer's reckless disregard for the provisions of the ADEA. Indeed, the "knew or showed reckless disregard standard" guarantees that liquidated damages serve their proper punitive function, different from the pure compensatory role of actual damages. *Thurston*, 469 U.S. at 125.

Unlike *Thurston*, the case at hand involves a claim of discrete employment discrimination. Plaintiff alleged discriminatory treatment against him as an individual based on his age,

without reference to any employment policy. To prevail on his ADEA claim, plaintiff had to prove, and did prove, that " 'but-for' defendants' motive to discriminate against him because of age, he would not have been discharged." *Loeb*, 600 F.2d at 1019. Having so proven, a wooden application of the "knew or showed reckless disregard" standard would not properly distinguish between simple and willful ADEA violations, because plaintiff, in establishing the actual ADEA violation, already had to prove that age discrimination motivated the employer to fire plaintiff. *Menard*, 848 F.2d at 285. The "knew or showed reckless disregard" standard, applied without reference to the two-tiered liability scheme, would therefore result in liquidated damages in practically every case of discrete employment discrimination, despite the Supreme Court's rejection of such a result.

Courts from other circuits have found it necessary to distinguish between simple and willful age discrimination, in an effort to insure that liquidated damages awards do not become automatic. *Turner* v. *Schering-Ploug Corp.*, 901 F.2d 335, 346 (3rd Cir. 1990); *Neufeld* v. *Searle Laboratories*, 884 F.2d 335, 340-41 (8th Cir. 1989); *Hansard* v. *Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989); *Anderson* v. *Phillips Petroleum Co.*, 861 F.2d 631, 635-36 (10th Cir. 1988). In *Neufeld*, *supra*, for example, the court decided that there must be "direct evidence — more than just an inference from, say, an arguably pretextual justification—of age-based animus" to warrant an award of liquidated damages. *Neufeld*, 884 F.2d at 340.

To date, the First Circuit has offered no guidance on this point. Thus, while the Court will apply the "knew or showed reckless disregard" standard in accordance with controlling precedent, it will not apply that standard in a manner that would frustrate congressional intent or Supreme Court interpretations. Upon consideration of *Neufeld* and similar authorities, the Court now holds that plaintiff, in order to

recover liquidated damages, must prove that the employer engaged in specific age-based conduct that rises above an ordinary ADEA violation. Inferential evidence of discrimination is not enough to establish willfulness. Mere proof of an ADEA violation, without more, does not adequately distinguish between ordinary and willful violations of the ADEA. There must be proof sufficient to push the level of conduct to a higher plateau. Having so stated the law, the Court now decides that the jury's finding of willfulness must be set aside for the following reasons.

The evidence in this case, if examined in relation to ADEA cases considered by courts of appeals in other circuits, is simply not adequate to warrant a finding of willfulness. In *Reynolds v. CLP Corporation*, 812 F.2d 671 (11th Cir. 1987), the plaintiff was demoted and then fired from her position as store manager after fifteen years of service. The plaintiff alleged "that CLP engaged in a systematic campaign of harassment and humiliation in an effort to force [plaintiff] to resign." *Id.* at 673. The evidence showed that the employer expressly sought "new" and "young Miss America type" employees. *Id.* The case also included evidence that less than six months before her discharge, the employer demoted plaintiff, cut her pay by $10,000.00, placed her under the supervision of a store manager who "had ways of getting rid of CLP's unwanted employees," *id.*, fired her, and replaced her with a woman in her twenties. The court of appeals upheld the jury's award of liquidated damages.

In *Neufeld*, *supra*, the employer fired plaintiff, age 52, after seventeen years of service in the Kansas City sales district. The employer replaced plaintiff with a twenty-seven year old sales agent. *Neufeld*, 884 F.2d at 337. Testimony of a non-party employee indicated that plaintiff's supervisor from Kansas City, Ed Kill, tried to emulate other sales districts. "Kill said that the Indianapolis district manager had 'gotten rid of the older people . . . [and] had hired younger people,' and that 'this is what [Kill] was trying to do with [the Kansas City] district.'" *Id.* at 338, *citing* district court transcript at 336. The testimony showed that Mr. Kill found Mr. Neufeld to be the appropriate

"sacrificial lamb." *Id.* at 338. Mr. Neufeld was the oldest sales agent in the district, and the evidence clearly supported the jury's finding that Mr. Kill fired Mr. Neufeld because of his age. According to one witness, "Kill commented that 'one way of looking at it, you get rid of the old guys, put in the new people, the figures change.'" *Id.* at 338, *citing* district court transcript at 764. Again, the court of appeals upheld a jury's finding of willfulness.

The *Reynolds* and *Neufeld* cases contain strong evidence of age-based discrimination by the employer. In these cases, the employer demoted the older employee, or cut the employee's pay, or made disparaging statements directed at the employee's age, or otherwise by conduct or statements established a plain nexus between the discharge and the employee's age. In comparison, the instant case, while containing the few strands of age-based evidence summarized above, lacks powerful evidence of age-based animus.

The instant case closely resembles cases such as *Smith* v. *Consolidated Mutual Water Co.*, 787 F.2d 1441 (10th Cir. 1986), where the Tenth Circuit Court of Appeals found no willful ADEA violation. In *Smith*, the plaintiff's supervisor often referred to plaintiff as "an old goat," criticized him for being slow, commented that he had been "knocked around a bit over the years," and fired him in favor of a younger worker. *Smith*, 787 F.2d at 1442. The Court held that "[a]lthough the evidence is thin and circumstantial, we conclude that, taken as a whole, it is enough to permit a reasonable juror to infer that age was a determinative factor in Consolidated's decision." *Id.* While the court of appeals found that plaintiff had adequately proven an ADEA violation, the court held that "[t]he thin nature of the evidence presented by Mr. Smith at trial compels us to agree with the trial court that Consolidated's conduct was not 'willful' under the standard announced by the Supreme Court in *Trans World Airlines, Inc.* v. *Thurston, supra.*" *Id.* at 1443.

The Court has also considered *Morgan* v. *Arkansas Gazette*, 897 F.2d 945 (8th Cir. 1990). In *Morgan*, numerous Gazette

employees testified regarding the age-based employment decisions allegedly made by a particular Gazette manager, one Tinker. The record indicated "a pattern of employees over the age of forty leaving the circulation department and being replaced by younger employees. . . ." *Morgan*, 897 F.2d at 950. Testimony demonstrated age-based hiring, payment and firing practices by Mr. Tinker. The record contained evidence that Mr. Tinker referred to an older employee as an "old fuddy-duddy," and that "no matter what he did, [Morgan] would be fired because Tinker was out to get all the older, experienced employees." *Id.* As in *Smith*, the court of appeals found the evidence sufficient to support a finding of liability, but inadequate under *Thurston* to trigger liquidated damages. *See also Krause* v. *Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir. 1990)(even though jury finds that employer discharged plaintiff in violation of ERISA, court of appeals finds evidence insufficient to support a finding of willfulness); *Gillian* v. *Armtex, Inc.*, 820 F.2d 1387 (4th Cir. 1987)(in affirming judgment notwithstanding the verdict on the question of liquidated damages, the court of appeals finds the evidence "too thin" to support of [sic] finding of willfulness).

In the instant case, as in *Smith* and *Morgan*, the evidence was largely circumstantial. Indeed, Mr. Biggins' testimony supplied almost all of the evidence of age discrimination offered in the case. While "[a] claim of discrimination need not be proven solely through direct evidence," *Conway* v. *Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987), the Court will not allow liquidated damages if based on sparse or circumstantial evidence, or on self-serving testimony. Having considered the evidence as a whole and as summarized above, the Court finds the evidence incapable of supporting a finding of willfulness.

c. Count II: ERISA

In Count II of the complaint, plaintiff alleges that defendants fired him in order to prevent his attainment of pension rights, in violation of section 510 of ERISA, 29 U.S.C. §1140. The jury

found in plaintiff's favor on Count II, and awarded plaintiff $100,000.00 in damages.

Section 510 provides that "[i]t shall be unlawful for any person to discharge . . . a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee pension plan) . . . ." Congress designed section 510 to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." *West* v. *Butler*, 621 F.2d 240, 245 (6th Cir. 1980). To recover under section 510, a plaintiff must prove that "an employer was at least in part motivated by the specific intent to engage in activity prohibited by § 510." *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988)(citations omitted). However, proof that an employee lost pension benefits as a mere consequence of discharge will not create a cause of action under ERISA. *Gavalik* v. *Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir.), *cert. denied*, 484 U.S. 979 (1987); *Titsch* v. *Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff'd mem.*, 742 F.2d 1441 (2d Cir. 1983). Plaintiff must demonstrate that the employer fired him with the "unlawful purpose" to prevent plaintiff from attaining pension rights. *Dister*, 859 F.2d at 1111 (collecting cases).

Plaintiff offered ample evidence of an ERISA violation, and the jury verdict on Count II must therefore stand. Plaintiff testified that at the time of his discharge, he had almost ten years of service at Hazen Paper Company. 1 Tr. 128.[4] Thomas Hazen offered similar testimony. 4 Tr. 97-98. Thomas Hazen also testified that he was in charge of pension account matters at Hazen

[4] After the conclusion of discovery, plaintiff's counsel found that plaintiff may in fact have attained the right to collect pension benefits before defendants fired him. Plaintiff offered into evidence, as exhibit 26, the summary plan description of defendants' pension plan. 4 Tr. 97. The summary plan description provides that "if the aggregate of years and months of service exceeds five, then an additional year will be added in determining your vested percentage." 4 Tr. 97 (testimony of Thomas Hazen). If this provision applied to plaintiff, then plaintiff would have had more than ten years of service for pension purposes.

Paper Company, and regularly received pension account statements regarding individual employee pension status. 4 Tr.94-95. This evidence, in combination with evidence of the proffered consulting position, supports the inference that defendants fired plaintiff with the intent to deprive him of earned pension benefits. Because the jury could reasonably have drawn such an inference from the evidence, the Court will not set aside the verdict with regard to the ERISA claim.

d. Count IV: Wrongful Discharge

On Count IV, the jury returned a verdict in plaintiff's favor, and awarded one dollar in damages.

The general rule in Massachusetts is that an at-will employee-like plaintiff may be terminated with or without cause. *Glaz* v. *Ralston Purina Co.*, 24 Mass. App. Ct. 386, 389, 509 N.E.2d 297, 299, *rev. denied*, 400 Mass. 1106, 513 N.E.2d 1289 (1987). Exceptions to the general rule exist, however. For example, an employee has a cause of action for wrongful discharge if the discharge is in bad faith or contrary to public policy. *DeRose* v. *Putnam Management Co., Inc.*, 398 Mass. 205, 210, 496 N.E.2d 428, 431 (1986); *Siles* v. *Travenol Laboratories, Inc.*, 13 Mass. App. Ct. 354, 433 N.E.2d 103, *rev. denied*, 386 Mass. 1103, 440 N.E.2d 1176 (1982).

Defendants argue that "[p]laintiff's recovery for wrongful discharge . . . depends upon the enforceability of the stock promise and whether plaintiff ever was lawful owner of the water based acrylic formula." Defendants' Brief in Reply to Plaintiff's Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict at 12 (October 23, 1990) ("Defendants' JNOV Reply"). Defendants contend that "[p]laintiff's claim has always been that selling the rights to 'his process or formula' was consideration for Hazen stock." Defendants' Brief in Support of Motion for Judgment Notwithstanding the Verdict at 11 (September 11, 1990)("Defendants' Brief for JNOV"). Because the jury found that plaintiff never owned the paper treatment formula in question, defendants argue, any alleged

stock-for-formula agreement lacks consideration, and is unenforceable. Thus, defendants contend that they cannot be liable for wrongful discharge, because the firing of plaintiff did not prevent plaintiff from receiving a benefit to which he was entitled.

The Court finds defendants' argument unpersuasive because it does not properly characterize plaintiff's wrongful discharge claim. It is true that the jury found that plaintiff had no ownership rights to the formula. *See* Special Verdict at 3 (July 20, 1990). However, while plaintiff does claim that defendants agreed to compensate him with stock in return for use of the formula, plaintiff also contends that defendants promised the stock as compensation for services rendered. No party disputes that plaintiff repeatedly sought greater compensation for his work at Hazen Paper Company; the disagreement centers around what defendants did to accommodate plaintiff's demand.

Plaintiff's version is that defendants agreed that plaintiff deserved a $100,000.00 salary for the work he performed for defendants, 1 Tr. 97, and that defendants agreed to pay plaintiff "the difference between my salary and $100,000.00 in stock." 1 Tr. 98. Plaintiff testified that when reminded by plaintiff of the stock promises, Thomas Hazen never denied that he promised plaintiff stock compensation, 1 Tr. 105, 125, but that defendants nevertheless failed to tender the stock as promised. *Id.* Plaintiff further testified that he agreed to sign over to defendants any rights he had to the paper treatment formula in return for fulfillment of the stock promises. 1 Tr. 98-99. Finally, after plaintiff refused to sign the confidentiality agreement, defendants fired plaintiff in order to avoid honoring their stock promise. 1 Tr. 126-27.

Given this evidence, the Court finds ample consideration for the stock promise alleged by plaintiff. The agreement called for increased compensation for plaintiff, in the form of salary or its equivalent. The consideration for the stock promise was the present and continued satisfactory performance of services for

Hazen Paper Company. Thus, while the jury's verdict with regard to the ownership of the formula does reject the notion that plaintiff had any ownership right to the formula, it does not entirely destroy consideration for the stock promise.

The evidence also suffices to support the verdict for wrongful discharge. As noted above, plaintiff in this case testified — and the jury found — that defendants promised plaintiff stock, as a substitute for salary, equal in value to the difference between plaintiff's salary and $100,000.00. Plaintiff also testified that while the Hazens never denied promising the stock, they never delivered on the promise, and fired plaintiff in order to avoid rendering the promised compensation. Therefore the Court will not disturb the jury's verdict on Count IV.

e. Count V: Fraud

In Count V, plaintiff alleged that defendants fraudulently failed to honor their promise to compensate plaintiff with stock. The jury found in plaintiff's favor, and awarded plaintiff $315,098.00 in damages for fraud.

> "[A] fraud may be defined to be any artifice whereby he who practices it gains, or attempts to gain, some undue advantage to himself, or to work some wrong or do some injury to another, by means of a representation which he knows to be false, or of an act which he knows to be against right or in violation of some positive duty."

Commonwealth v. *O'Brien*, 305 Mass. 393, 397-398, 26 N.E.2d 235, 238 (1940), *quoting Commonwealth* v. *Tuckerman*, 76 Mass. (10 Gray) 173, 203 (1857). An action in fraud requires plaintiff to prove "that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to his damage." *Barrett Associates, Inc.* v. *Aronson*, 346 Mass. 150, 152, 190 N.E.2d 867, 868 (1963), *quoting Kilroy* v. *Bar-*

ron, 326 Mass. 464, 465, 95 N.E.2d 190, 191 (1950). Because the evidence adduced at trial amply satisfies these elements, the jury verdict for fraud will stand.

In essence, defendants' attack on the jury's fraud verdict comes in two parts. First, defendants argue that plaintiff failed to prove detrimental reliance on defendants' misrepresentation. Second, defendants assert that plaintiff never established damages directly resulting from defendants' misrepresentation. The Court will discuss each contention in turn.

A plaintiff must prove more than mere deception to establish a cause of action for fraud. Massachusetts case law requires that a plaintiff show detrimental reliance in order to collect for fraud. *Nei* v. *Burley*, 388 Mass. 307, 311, 446 N.E.2d 674, 677 (1983); *Kilroy*, 326 Mass. at.465, 95 N.E.2d at 191. Courts will find detrimental reliance where the misrepresentation "materially influenced" the plaintiff, in whole or in part, to take action or refrain from acting. *National Shawmut Bank* v. *Johnson*, 317 Mass. 485, 490, 58 N.E.2d 849, 852; *Schinkel* v. *Maxi-Holding, Inc.*, 30 Mass App. Ct. 41, 48, 565 N.E.2d 1219, 1224 (1991)(plaintiff adequately states a claim for fraud where, although plaintiff rendered managerial services and partial payments in reliance on defendants' promise to tender company stock, defendants refused to deliver stock as promised).

Massachusetts law further provides that in a fraud action, the misrepresentation need not be the sole or predominating motive that induced the victim to engage in particular conduct. *National Shawmut Bank*, 317 Mass. at 490, 58 N.E.2d at 852. There may be one or many motivating reasons for a person's act or omission; but if a person acts or refrains from acting, in complete or partial reliance on a false representation, the element of detrimental reliance is satisfied. *See National Car Rental System, Inc.* v. *Mills Transfer Company*, 7 Mass. App. Ct. 850, 852, 384 N.E.2d 1263, 1264 (1979).

Defendants argue that because the jury found that plaintiff never owned the formula, plaintiff cannot assert that his "detriment" was loss of rights to the formula. Defendants' Brief for

JNOV at 12-13. While the Court agrees with defendants that plaintiff cannot claim as his legal detriment the loss of rights to the formula, plaintiff adequately proved other legal detriment sufficient to support a finding of fraud. As with the wrongful discharge count, *see supra* at 19-22, plaintiff's rendition of present and continuing service at Hazen Paper Company provides the legal detriment for the fraud claim. All parties agree that plaintiff sought a $100,000.00 salary in exchange for his continuing employment. Plaintiff testified, and the jury apparently believed, that defendants agreed to pay plaintiff approximately $44,000.00 in salary, and the balance of plaintiff's compensation in stock. 1Tr.98. Thus, the jury could have found that plaintiff continued to work for Hazen Paper Company, after defendants initially promised to give plaintiff stock, in reliance on the stock promise. This provision of continued services in exchange for the stock promise is sufficient to provide "detrimental reliance."

Defendants further argue that plaintiff did not rely to his detriment on defendants' misrepresentation because "plaintiff failed to introduce any evidence indicating that Plaintiff was deprived of alternative employment opportunities by remaining a Hazen employee during the period that the alleged promise was made." Defendants' Brief for JNOV at 13. This argument confuses the element of reliance with the element of damages. Although proof of lost wages or income might help bolster a claim for fraud, plaintiff need not show that his reliance caused him to forego earning opportunities of which he might otherwise have availed himself. Rather, plaintiff need only show that he acted or refrained from acting, at least in part because he relied on the misrepresentation. As discussed *supra*, plaintiff satisfied the reliance element by showing that he continued to work at Hazen Paper Company, after the misrepresentation, in part because the Hazens promised to compensate him with shares of Hazen Paper Company stock in addition to his salary.

With respect to damages, however, a plaintiff who alleges

may recover according to the "benefit of the bargain" rule. *Productora e Importadora de Papel, S.A. de C.V.* v. *Fleming*, 376 Mass. 826, 838, 383 N.E.2d 1129, 1136-37 (1978); *Rice* v. *Price*, 340 Mass: 502, 507-511, 164 N.E.2d 8911 894-97 (1960). This means that plaintiff may recover as damages the value of the benefit that he would have received had the misrepresentations been true. Under the benefit of the bargain rule, "damages would be measured by the difference in value between the performance promised . . . and that actually rendered." *Fleming*, 376 Mass. at 838, 383 N.E.2d at 1137.

In this case, plaintiff offered evidence of the value of the stock promised him. Plaintiff's witnesses testified to the value of Hazen stock in the relevant years, 2 Tr. 154-55 (John T. Moriarty, certified public accountant), and to the value of the total stock that plaintiff would have received had defendants honored their stock promise. 2 Tr. 193-94 (Dr. Craig L. Moore, professor of management at the University of Massachusetts); *see* Plaintiff's Trial Exhibit 21 (containing Dr. Moore's calculations regarding stock loss, estimated at $342,498.00). This unrefuted testimony provides sufficient evidence of damages, consistent with the "benefit of the bargain" rule, in an amount equal to the value of the compensation that plaintiff would have received had defendants made good on the stock promise.

In short, because plaintiff offered evidence sufficient to satisfy the elements of fraud, the jury's verdict on Count V will stand.

f. Count VII: Massachusetts Civil Rights Act

On Count VII, the jury found that defendants violated plaintiff's rights under the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, §§ 11H, 11I ("MCRA"). The jury awarded damages in the amount of $1.00.

The Massachusetts legislature created the MCRA to protect individuals from civil rights violations perpetrated by private parties. *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 98, 502 N.E.2d 1375, 1378 (1987) (MCRA contains no

state action requirement). Courts should construe the provisions of the MCRA broadly in order to effectuate the remedial purposes of the statutes. *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819, 822, 473 N.E.2d 1128, 1130 (1985) ("*Batchelder II*").

To establish a violation of the MCRA, a plaintiff must prove that

> (1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by "threats, intimidation or coercion."

Bally v. *Northeastern University*, 403 Mass. 713, 717, 532 N.E.2d 49, 51-52 (1989). Of course, "[n]ot every violation of law is a violation of the State Civil Rights Act." *Longyal* v. *Commissioner of Correction*, 404 Mass. 325, 3331 535 N.E.2d.588, 593 (1989). "[T]he legislature did not intend to create 'a vast constitutional tort,' and thus explicitly limited the [MCRA]'s remedy to situations where the derogation of secured rights occurs by threats, intimidation or coercion." *Bally*, 403 Mass. at 718, 532 N.E.2d at 52, *quoting Bell* v. *Mazza*, 394 Mass. 176, 182-183, 474 N.E.2d 111 (1985)

Defendants argue that the Court should grant judgment notwithstanding the verdict because, contrary to plaintiff's contention, defendants did not deprive plaintiff of any property rights. Defendants further argue that even if defendants did deprive plaintiff of some property right, no threat, intimidation, or coercion was involved.

Plaintiff, on the other hand, has consistently asserted that defendants used threats, intimidation and coercion in an effort to take plaintiff's property rights to the formula without just compensation. *See, e.g.*, Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 25 (April 13,

1990); Plaintiff's Amended Complaint at 12 (July 26, 1988). Given the jury's verdict as to ownership of the formula, however, this argument must fail. Any claim by plaintiff based on ownership rights to the formula must fail in light of the jury's determination that defendants owned the formula throughout the relevant time period.

Apparently in response to the jury's verdict, plaintiff makes a slightly different argument with regard to his MCRA claim in his post-trial pleadings. Plaintiff now argues that defendants interfered with plaintiff's rights to Hazen Paper Company stock. "[Plaintiff's] property right to the stock was the subject of coercion when the Defendants attempted to extort from him a release of the formula rights without payment of their stock promise." Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict at 16 (September 25, 1990). Plaintiff claims that defendants violated the MCRA because they did not tender stock as promised, and that they threatened to and did fire plaintiff in order to avoid the stock obligation. Accepting these allegations as true, the Court must nevertheless grant judgment notwithstanding the verdict on Count VII.

The Supreme Judicial Court has never expanded the MCRA to encompass conduct such as that alleged by plaintiff. Most MCRA actions recognized by the Supreme Judicial Court involve the threat of physical contact. *O'Connell* v. *Chasdi*, 400 Mass. 686, 511 N.E.2d 349 (1987)(sexual harassment in employment); *Batchelder II*, *supra* (plaintiff threatened by shopping mall security officer while plaintiff distributes pamphlets); *Bell*, *supra* (defendants threaten to do "anything at any cost" to prevent improvement of property next door). The Supreme Judicial Court has refused to expand the MCRA to reach drug testing of student athletes by university officials, *Bally*, *supra*, or the improper taking of real property by a town board of selectmen. *Pheasant Ridge Associates* v. *Town of Burlington*, 399 Mass. 771, 506 N.E.2d 1152 (1987). Those few MCRA cases that do not involve threats of physical harm have

involved more than simple violations of law. For example, *Redgrave*, *supra*, concerned conduct that was both in violation of uncontested and existing contract rights, and destructive to the exercise of first amendment or other important individual rights. *See also Longval*, 404 Mass. at 333, 535 N.E.2d at 593 ("A direct violation of a person's rights does not by itself involve threats, intimidation, or coercion. . . ."); *Karetnikova* v. *Trustees of Emerson College*, 725 F. Supp. 73 (D. Mass. 1989).

Given this authority, plaintiff's MCRA claim fails. The evidence simply does not demonstrate "threats, intimidation or coercion" as those words have been defined by the Supreme Judicial Court, and this Court cannot change the scope of state law in order to accommodate plaintiff's claim.

g. Count VIII: Breach of Contract

The jury found defendants liable for breach of employment contract, and awarded plaintiff damages in the sum of $266,897.00.

Defendants contend that no employment contract existed between plaintiff and defendants, and that they are entitled to judgment notwithstanding the verdict on that basis. *See* Defendants' JNOV Reply at 17-19. Defendants further argue that even if defendants did breach an employment contract, plaintiff failed to prove damages resulting from the breach.[5] The Court, however, finds that an employment contract did exist, and that defendants' conduct, viewed in a light most favorable to plaintiff, constituted breach of that contract. The Court fur-

[5] In their motion to alter or amend the judgment, defendants argue that the jury adequately compensated plaintiff under the ADEA claim, and that any award of damages for breach of contract is duplicative. Defendants' Memorandum in Support of Motion to Alter or Amend Judgment at 2 (September 11, 1990) ("Defendants' Memorandum to Alter or Amend"). This argument, although made in the motion to alter or amend, is relevant to the issue of judgment notwithstanding the verdict on the breach of contract claim, because it concerns the element of damages. Thus, the Court will consider defendants' duplicative damages argument in the context of judgment notwithstanding the verdict, and will discuss the remainder of defendants' motion to alter or amend *infra*.

ther finds evidence of damages due to the breach. Therefore, the Court denies defendants' motion for judgment notwithstanding the verdict on the breach of contract claim.

A binding employment contract exists where there is certainty as to the parties bound, the nature of the service, and the approximate compensation due. *Parsons* v. *Trask*, 73 Mass. (7 Gray) 473, 477-78 (1856). A valid employment contract may be " 'found to exist from the conduct and relations of the parties.' " *Jackson* v. *Action for Boston Community Development*, 403 Mass. 8, 9, 525 N.E.2d 411, 413 (1988), *quoting LiDonni, Inc.* v. *Hart*, 355 Mass. 580, 583, 246 N.E.2d 446, 449 (1969). Where an employee provides services in return for wages paid by the employer, courts will, in the absence of express provisions to the contrary, infer the existence of an at-will employment contract. *Jackson*, 403 Mass. at 13, 525 N.E.2d at 414; *DeRose*, 398 Mass. at 206, 496 N.E.2d at 429.

If nothing more, plaintiff in this case had an at-will employment contract with defendants. Plaintiff received wages in return for services rendered. In addition, the jury could, and apparently did, find that the circumstances surrounding plaintiff's employment and the language in the Hazen Paper Company manual supplied additional implied provisions to plaintiff's employment contract. Massachusetts law permits such a finding. *Jackson*, 403 Mass. at 14, 525 N.E.2d at 415 (collecting cases). Viewing the evidence in a light most favorable to the plaintiff, the jury could have found that the employment contract prohibited defendants from firing plaintiff unless plaintiff committed "outlandish, gross violations of standards or fail[ed] to respond to repeated counselling. . . ." Plaintiff's Trial Exhibit 11 at 3 (Hazen Paper Company Employee Handbook on Personnel Policies and Benefits).

Having established the existence of the contract and its terms, plaintiff also demonstrated that defendants breached the contract. Again viewing the evidence in a light most favorable to

plaintiff, the jury could have found that defendants breached the contract in all or any of three ways: by discharging plaintiff because of his age, by discharging plaintiff in order to prevent him from enjoying his pension rights, or by discharging plaintiff in order to avoid honoring their stock promise. The Court has adequately reviewed the evidence of these illegalities *supra*.

However, once plaintiff establishes the existence of a contract and a breach of that contract, he must also prove that he suffered damages caused by defendants' breach of the contract. *Goldman* v. *Mahoney*, 354 Mass. 705, 709, 242 N.E.2d 405, 409 (1968); *Gray* v. *Tobin*, 252 Mass. 238, 147 N.E. 580 (1925). Plaintiff may not collect duplicate damages under a state law theory if the jury has already compensated him under a federal statute. *See Howard* v. *Daiichiya-Love's Bakery, Inc.*, 714 F. Supp. 1108, 1113 (D. Hawaii 1989)(ADEA case); *see also Freeman* v. *Package Machinery Co.*, 865 F.2d 1331, 1344 n.7 (1st Cir. 1988). Thus, plaintiff's evidence must show that the damages awarded on the breach of contract claim are independent and separate from the damages awarded under the ADEA, ERISA, fraud or other counts.

Defendants here argue that plaintiff's recovery for breach of contract duplicates damages already recovered under the ADEA. The Court rejects this argument. As evidence of damages, plaintiff offered the testimony and calculations of Dr. Moore. While all of the damages stated by Dr. Moore's [sic] were compensable under the ADEA, the jury needed not award the money exclusively under that theory. Rather, the jury could have awarded part of the damages under the ADEA, and part under other theories. The jury awarded $560,775.00 under the ADEA, $100,000.00 under ERISA, and $266,897.00 under the breach of contract claim. Such an award, while fragmentary, is permissible under existing law, as long as the total sum awarded by the jury does not exceed the credible evidence of damages offered at trial.

The Court further notes that under existing law, recovery under the ADEA does not preempt tort or contract claims under

state law. *Linn* v. *Andover Newton Theological School, Inc.*, 874 F.2d 1 (1st Cir. 1989)(plaintiff may recover under ADEA and for breach of employment contract); *Cancellier* v. *Federated Department Stores*, 672 F.2d 1312, 1318 (9th Cir.) (court finds that recovery under the ADEA does not preempt award of damages based on defendant's state claim of breach of employment contract), *cert. denied*, 459 U.S. 859 (1982); *accord Pettibon* v. *Pennzoil Products Co.*, 649 F. Supp. 759, 761 (W.D. Pa. 1986).[6] The Court therefore denies defendants' motion for judgment notwithstanding the verdict on the breach of contract claim.

2. New Trial

Having found judgment notwithstanding the verdict inappropriate in all respects except as to willfulness and Count VII, the Court must now consider defendants' new trial arguments.

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[6] The Ninth Circuit Court of Appeals, among other courts, has expressed concern with the "wisdom of allowing open-ended state claims for breach of the implied covenant to coexist with ADEA claims. . . ." *Cancellier*, 672 F.2d at 1318. This Court also dislikes the notion that plaintiff can recover under a state contract theory damages that are available under the ADEA. *See Loeb*, 600 F.2d at 1021. Under the ADEA, a plaintiff may recover " 'items of pecuniary or economic loss such as wages, fringe, and other job-related benefits.' " *Id.*, *quoting* H. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 523, 535. Arguably, plaintiff received under the ADEA all the damages to which he was entitled. Indeed, the Court finds no evidence of record showing that plaintiff suffered damages from the breach of contract separate and independent from those already recovered pursuant to the ADEA, ERISA, or fraud. To the contrary, it seems likely that the awards returned under the various state law counts (totalling $581,997.00) represent small parts of the larger ADEA award. However, the Court will not speculate as to the jury's calculations. Absent any instructive First Circuit authority with regard to whether plaintiffs can recover, on a state contract theory, damages available under the ADEA, the Court is reluctant to disturb the jury's verdict. Thus, because plaintiff has established the elements of breach of contract, the jury may under existing law award him additional damages under that theory.

> The Court may set aside a verdict and grant a new trial "when the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice." *Phav* v. *Trueblood, Inc.*, 915 F.2d 764, 766 (1st Cir. 1990) (citations omitted). While a trial court should not grant a new trial simply because the court would have reached a different conclusion, the court wields broad discretion in determining whether to grant a new trial. *de Perez* v. *Hospital del Maestro*, 910 F.2d 1004, 1006 (1st Cir. 1990). This Court exercises its discretion frugally, and will not grant a new trial unless necessary to prevent a significant dereliction of justice.

Flag Fables, Inc. v. *Jean Ann's Country Flags and Crafts, Inc.*, 753 F. Supp. 1007, 1012 (D. Mass. 1990)(Freedman, C.J.).

Defendants make numerous arguments in support of their motion for new trial. *See generally* Defendants' Brief in Support of Motion for New Trial (September 11, 1990)("Defendants' Brief for New Trial") and Defendants' Brief in Reply to Plaintiff's Opposition to Defendants' Motion for New Trial (October 23, 1990)("Defendants' New Trial Reply"). Some of these arguments were rejected *supra* with respect to defendants' motion for judgment notwithstanding the verdict, and the Court finds them equally impotent in the new trial context. The Court will, however, briefly discuss two of defendants' most vehement arguments.

Defendants first argue that the jury awarded an excessive amount of damages. While a court may grant a new trial if the jury has awarded excessive damages, a jury may if it chooses award generous damages. In cases involving age discrimination, the district court may set aside damages awards and grant a new trial only if the verdict is "shown to exceed 'any rational appraisal or estimate of the damages that could be based upon

the evidence before the jury.'" *Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 871 (1st Cir. 1982), *quoting Glazer* v. *Glazer*, 374 F.2d 390, 413 (5th Cir.), *cert. denied*, 389 U.S. 831 (1967). The cases clearly indicate that where credible evidence of damages exist, the court may not disturb the jury award. *Cf. Hendricks & Associates, Inc.* v. *Daewoo Corp.*, 923 F.2d 209 (1st Cir. 1991)(court orders remittitur or new trial where jury awarded damages in excess of those sought by plaintiff). "While in calculating damages the jury is free to select the highest figures for which there is adequate evidentiary support, it may go no higher." *Kolb*, 694 F.2d at 872.

It is uncontested that plaintiff alleged total damages in the amount of $1,375,614.12. 2 Tr. 188 (testimony of Dr. Moore); Plaintiff's Trial Exhibit 21; Plaintiff's Memorandum in Opposition to Defendants' Motion for New Trial at 8 (September 25, 1990). Plaintiff offered the testimony of Dr. Moore and Mr. Moriarty in support of that allegation, and their testimony was unrefuted. It is also true that the jury awarded a total of $1,242,772.00 in damages on all seven counts, some $132,842 less than the damages claimed by plaintiff. Because the jury did not select for total damages a figure higher than that alleged by plaintiff and evidenced in the record, the Court will not set aside any portion of the verdict on this basis.

Second, defendants argue that the jury verdict is internally inconsistent, and must therefore be set aside. Defendants argue that "[i]n order to find age discrimination, the jury had to conclude that Plaintiff's age was the 'determinative factor' in his termination. . . . Because Plaintiff allegedly would not have been terminated "but for" his age, an intent to deprive him of his pension benefits could not, as a matter of law, have been found to be the "motivating" or determinative factor in his termination." Defendants' Brief for New Trial at 3-4. Defendants thus appear to argue that the jury could not have found two determinative factors behind plaintiff's termination. Defendants demand that a new jury should decide whether plaintiff's age,

or the intent to deprive plaintiff of pension benefits, or neither, was the "determinative factor" behind plaintiff's termination.

As noted above, to recover under section 510 of ERISA, a plaintiff must prove that "an employer was at least in part motivated by the specific intent to engage in activity prohibited by § 510." *Dister*, 859 F.2d at 1111; *Baker* v. *Kaiser Aluminum and Chemical Corp.*, 608 F.Supp. 1315, 1318 (N.D. Cal. 1984). A discharged employee need not show that the sole objective behind the firing was to interfere with the employee's attainment of pension rights. *Clark* v. *Resistoflex Co. Division of Unidynamics*, 854 F.2d 762, 770 (5th Cir. 1988), *citing Gavalik*, 812 F.2d at 851. An employee need only show that the employer's desire to interfere with the employee's pension rights "was a 'determinative factor' in [the employer's] decision to terminate him." *Turner*, 901 F.2d at 347, *citing Gavalik*, 312 F.2d it 860.

The First Circuit has never explicitly held that a discharge can be motivated by two different determinative factors sufficient to satisfy both an ERISA and an ADEA claim in the same case. However, in *Loeb*, the First Circuit recognized that employers may have many motivations, both legal and illegal, for firing an employee. *Loeb*, 600 F.2d at 1019. The court of appeals held that while the employee need not prove that age was the sole factor behind the discharge, plaintiff's proof "that [age] was a determinative factor is . . . essential to recovery under the ADEA." *Id.* An employee "had to prove by a preponderance of the evidence that his age was the 'determining factor' in his discharge in the sense that, 'but for' his employer's motive to discriminate against him because of his age, he would not have been discharged." *Id.* Other courts have held that plaintiff must prove that the decision to fire was "at least in part motivated by the specific intent to engage in activity prohibited by [ADEA]." *Dister*, 859 F.2d at 1111.

Given this authority, the Court now holds that there may be more than one illegal determinative factor behind an employer's decision to discharge. Plaintiff's theory in this case offers a

good example, where the jury found that the Hazens discharged plaintiff because of his age and in order to interfere with pension rights. Were the rule otherwise, an employer who, for example, violates the ADEA would be immune from liability under ERISA, even if the evidence indicated discharge with the specific intent to interfere with pension rights. The Court cannot believe Congress intended such a construction of the statutes. Further, the Court can find no case in which a court has dismissed a lawsuit, or any portion of a lawsuit, under the ADEA and ERISA on the basis that there can be only one determining factor for the discharge. In sum, the Court finds no internal inconsistency in the verdict, and the motion for new trial is denied.

B. *Defendants' Motion to Alter or Amend the Judgment*

Defendants have moved to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Defendants make three separate arguments in support of their motion. First, defendants argue that the jury awarded duplicative damages, and that the Court should alter the judgment to prevent multiple recovery. The Court, having already found this apple unappealing, *supra* at 30-34, will not taste it again.

Second, defendants contend that plaintiff may not receive prejudgment interest on any part of his award if he has recovered liquidated damages. This is unquestionably true. *Linn* v. *Andover Newton Theological School, Inc.*, 874 F.2d 1 (1st Cir. 1989). However, the point is moot, given the Court's decision to grant defendants' motion for judgment notwithstanding the verdict on the liquidated damages question. Thus, plaintiff may collect interest on his entire award because plaintiff is not entitled to liquidated damages.

Defendants' third argument is that plaintiff may not recover interest on the fraud count because "the jury's award is clearly based upon the higher, present value of the stock." Defendants' Memorandum to Alter or Amend at 3. This argument lacks

merit. The Court must assume that the jury awarded that sum of money it felt necessary to compensate plaintiff for his loss due to defendants' misrepresentation. Indeed, no one except the jury really knows how the jury calculated the fraud award. The fact that plaintiff recovered the value of stock does not make this claim any different from other state tort claims. In fraud cases, plaintiffs often recoup money representing the value of a thing promised but not delivered. Plaintiff shall recover interest at the ordinary rate on the fraud award.

In sum, the Court denies entirely defendants' motion to alter or amend the judgment.

C. *Plaintiff's Motion for Attorney's Fees and Costs*

1. Attorney's Fees

Plaintiff has moved for an award of attorney's fees in the sum of $666,729.12. Defendants oppose plaintiff's request, and urge the Court to allow a much more modest award.

A successful plaintiff is entitled to collect reasonable attorney's fees under the ADEA. Section 626(b) of the ADEA requires that the provisions of the ADEA shall be enforced in accordance with the remedies and procedures provided in section 16 of the Fair Labor Standards Act, 29 U.S.C. § 216 ("section 216"). As amended, section 216 states that "[t]he court . . . shall, in addition to any judgment award to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and the costs of the action." The statutory language makes the award mandatory; the Court has discretion only to determine the amount of the fee award.

In civil rights cases, courts use the lodestar method to determine appropriate attorney's fees awards. *Blum* v. *Stenson*, 465 U.S. 886 (1984)(42 U.S.C. § 1983); *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983); *Wildman* v. *Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985)(ADEA). The lodestar is calculated by multiplying all of the hours reasonably expended on the litigation by a

reasonable hourly rate. *Blum*, 465 U.S. at 888. Courts should calculate reasonable attorney's fees according to prevailing market rates. *Id.* at 895. Once the court has determined the lodestar, the court may adjust the lodestar, up or down, if necessary to assure fair and adequate compensation for counsel. Courts should allow upward adjustment only "in some cases of exceptional success," *Hensley*, 461 U.S. at 435, and where plaintiff's counsel proves "that such an adjustment is necessary to determination of a reasonable fee. . . ." *Blum*, 465 U.S. at 898.

Section 1132(g) of ERISA also allows courts to award attorney's fees, but under different circumstances. While the ADEA provides for a mandatory fees award, section 1132(g) provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The award of attorney's fees under ERISA falls within the broad discretion of the district court. *Gray* v. *New England Telephone & Telegraph Co.*, 792 F.2d 251, 259 (1st Cir. 1986). The court must apply a five-pronged test when considering whether to award attorney's fees.

> This five factor standard considers (1) the degree of bad faith or culpability of the losing party; (2) the ability of such party to personally satisfy an award of fees; (3) whether such award would deter other persons acting under similar circumstances; (4) the amount of benefit to the action as conferred on the members of the pension plan; and (5) the relative merits of the parties' positions.

Id. at 257-58. If, upon consideration of these factors, the district court decides to award fees, the court may rely on the lodestar method to determine the amount of the award. *Hensley*, 461 U.S. at 433 n. 7 (lodestar analysis is generally applicable in all federal fee-shifting situations); *D'Emanuele* v. *Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1382-83 (9th Cir. 1990).

The Court finds that the circumstances of this case make an

award of attorney's fees under ERISA appropriate. In particular, the evidence that plaintiff had more than nine years service at Hazen Paper Company, and that defendants fired plaintiff in order to interfere with his attainment of pension rights tips in favor of an award of attorney's fees. The general deterrent value of an attorney's fee award on industry and pension plans in the area also makes an award suitable.

Plaintiff also prevailed on various state law claims, none of which provide for attorney's fees.[7] Ordinarily, a prevailing litigant in the United States may not recover attorney's fees or costs of his action absent an express legislative directive to the contrary. *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 421 U.S. 240, 247 (1975). However, the *Alyeska* rule does not prevent fee-shifting when a plaintiff successfully prosecutes a claim under a federal civil rights statute, and in the same action seeks additional or similar relief under other federal theories or pendant state law theories. Under these circumstances, a plaintiff may recover attorney's fees incurred for both his civil rights claim and the companion claims, regardless of whether the statutes upon which the companion claims are based provide for attorney's fees awards. *Hensley*, 461 U.S. at 435; *Wagenmann* v. *Adams*, 829 F.2d 196, 225 (1st Cir. 1987). Of course, the additional claims must bear a close relationship to the federal civil rights claim. If all the claims share "a common core of facts," or are based on "related legal theories," *Hensley*, 461 U.S. at 435, an attorney's fees award should compensate plaintiff based on the time spent on the litigation as a whole. *Accord Aubin* v. *Fudala*, 782 F.2d 287, 290-92 (1st Cir. 1986)(42 U.S.C. §1983).

In the end, the determination of the attorney's fees award remains in the sound discretion of the district court. *United States*

[7] Section 111 of the MCRA provides that "[a]ny aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court." While the jury returned a verdict in favor of plaintiff on the MCRA claim, the Court today grants judgment notwithstanding the verdict on that claim. Therefor plaintiff may not rely on the MCRA for an award of costs or attorney's fees.

v. *Metropolitan District Commission*, 847 F.2d 12, 14 (1st Cir. 1988). While the district court must supply an ample explanation for the fee award, *id.* at 16, and must "explain why it makes a substantial adjustment, up or down, of a diary-supported bill," *Jacobs* v. *Mancuso*, 825 F.2d 559, 560 (1st Cir. 1987), the district courts need not "drown in the rising tide of fee-generated minutiae." *Metropolitan District Commission*, 847 F.2d at 16.

Plaintiff has submitted ledgers detailing the work performed on the case. The ledgers include the date and type of work performed, an identification of the person who performed the work, and the amount of hours the work required. Plaintiff has also submitted an itemized, computerized record of daily time entries logged by the various individual attorneys that worked on the case. Plaintiff has further submitted affidavits detailing the rates ordinarily commanded by plaintiff's attorneys, and the rates ordinarily charged for cases of this nature. Plaintiff has also explained the contingent nature of the case, and the fact that Mr.Biggins lacked the personal means to bear the costs of maintaining the action since its inception in February of 1988. The Court finds all of these submissions helpful and adequate for the purpose of determining the lodestar.

The Court has carefully examined the documentation in order to determine the number of hours reasonably expended. The Court finds that the documentation adequately distributes core and non-core time. The Court further finds no unreasonable or duplicative fees, and defendants have pointed to no specific instances of misrepresentation or duplicity. The Court finds that plaintiff properly included as core hours the time necessary to complete fee applications. Therefore, the Court adopts, as the number of hours reasonably expended, the core and non-core hours calculated by plaintiff in his motion for attorney's fees and costs. Plaintiff's Motion for an Award of Attorney's Fees and Costs (September 26, 1990)(*see* exhibit A)("Plaintiff's Motion for Fees").

However, the Court will adjust slightly the hourly rates re-

quested by plaintiff. Plaintiff has properly distinguished between core and non-core activities in his fee submissions, but he failed to adopt a different, lower rate of compensation for the non-core hours. The Court, adopting plaintiff's suggestion, will award $165.00 per hour for core work performed by partners at Egan, Flanagan & Cohen, P.C., but the Court will award $100.00 per hour for non-core work performed by these experienced attorneys. *See M. Berenson Co.* v. *Faneuil Hall Marketplace*, 671 F. Supp. 819, 831 (D. Mass. 1987)("The court need not set the same rate for all work performed by a particular attorney; it may assign a different hourly rate to different categories of tasks."). Because no other attorneys performed non-core work, the Court need not discuss other core/noncore payment differentials. The Court will adopt plaintiff's suggestion to compensate Attorney Heemskerk at $135.00 per hour, and the Court will compensate other Egan, Flanagan & Cohen associates at $100.00 per hour. The Court will compensate for paralegal time expended at $50.00 per hour, regardless of the nature of the work.[8]

Having found the requested hours fair and reasonable, and having determined reasonable rates of compensation, the Court calculates the lodestar as follows.

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[8] In determining the hourly rates, the Court has considered, among other things, the following factors: (1) the amounts awarded in other recent cases, such as *Refuse & Environmental Systems Inc.* v. *Industrial Services of America*, 732 F. Supp. 1209 (D. Mass. 1990) (Freedman, C.J.) and *Cowan* v. *Prudential Insurance Company of America*, 728 F. Supp. 87 (D. Conn. 1990); (2) the Court's familiarity with the value of legal services in the current market generally and within this district in particular; (3) plaintiff's suggested rates; and (4) the submitted affidavits of local attorneys.

Partners				
Core Hours		Rate		Totals
959.40	x	$165.00	=	$158,301.00
Non-core Hours				
99.90	x	100.00		9,990.00
Associates				
Atty. Heemskerk				
.25	x	135.00	=	33.75
Other Associates				
57.60	x	100.00	=	5,760.00
Paralegal				
29.60	x	50.00	=	1,480.00
LODESTAR FIGURE				$175,564.75

The Court's lodestar figure is $6,493.50 less than the lodestar calculated by plaintiff. This difference occurs solely because the Court compensates partners' non-core work at $100.00 per hour, whereas plaintiff's figures compensated partners' non core work at $165.00 per hour.

As noted above, the Court may adjust the lodestar figure if necessary for the determination of a reasonable and fair fee. *Blum*, 465 U.S. at 898. Plaintiff argues that the Court should enhance the fee award to an amount equal to one-third of the total damages awarded, or $666,729.12. Defendants, of course, oppose any such adjustment.

In *Pennsylvania* v. *Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) ("*Delaware Valley II*"), Justice O'Connor[9] decided that while a district court could properly consider the contingent nature of a case when determining a reasonable

[9] The Supreme Court issued three opinions in *Delaware Valley II*. Justice White, representing four members of the Court, wrote the plurality opinion. Four other justices dissented in an opinion written by Justice Blackmun. Justice O'Connor, writing on her own behalf, concurred in part and in the judgment, but agreed with the dissenters on one important point.

Because Justice O'Connor cast the decisive fifth vote in *Delaware Valley II*, her opinion represents a majority of justices to the extent that she expressed agreement with either the plurality or the dissent. Thus, the Court accepts Justice O'Connor's opinion as the law of the land on the issue.

attorney's fee under federal fee-shifting provisions, *id.* at 731, "a court may not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel." *Id.* at 733. Likewise, the Court cannot adjust the lodestar due to the " 'legal' risk or risks peculiar to the case." *Id.* at 734. Neither may the Court consider the quality of the representation or the complexity of the case when considering adjustment of the lodestar. *Pennsylvania* v. *Delaware Valley Citizens Council*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*"). Rather, the lodestar " 'is presumed to be the reasonable fee' to which counsel is entitled." *Delaware Valley I*, 478 U.S. at 564, *citing Blum*, 465 U.S. at 897.

This case is not sufficiently rare or exceptional to justify an enhancement of the lodestar. The Court is satisfied that the lodestar adequately compensates counsel for the work provided in this action, and that an award of $175,564.57 is sufficient to attract competent counsel in the relevant market. Furthermore, the Court cannot, under the law or consistent with conscience, award an attorney's fee almost four times the amount of the lodestar. Such a departure would be an abuse of discretion in light of the frugal methods adopted in recent Supreme Court cases. In sum, because the Court finds that the lodestar figure embodies a reasonable attorney's fee within the meaning of the ADEA and ERISA, the Court will award plaintiff that amount.

2. Costs

Plaintiff may also recover costs of the action under the ADEA and ERISA. As with the attorney's fees, plaintiff may recover costs incurred on the entire action, not just on the federal claims.

Plaintiff claims to have incurred $13,276.57 in costs on the action. The bill properly includes photocopying costs, service of process costs, postage, and other incidentals. However, the bill of costs also includes substantial expert witness fees.

Successful civil rights plaintiffs may not recover more than

$30.00 per day for expert witness attendance fees absent an explicit statutory provision. 28 U.S.C. § 1821; *Denny* v. *Westfield State College*, 880 F.2d 1465, 1468-71 (1st Cir. 1989); *Glenn* v. *General Motors Corp.*, 841 F.2d 1567, 1573-75 (llth Cir.), *cert. denied*, 488 U.S. 948 (1988); *see also Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). Plaintiffs may, however, recover the costs incurred by experts during case preparation, for strategic advice rendered outside the courtroom, and so forth. *Denny*, 880 F.2d at 1474 (Breyer, C.J., concurring) (collecting cases). The ADEA and ERISA, while they do provide for "costs" awards, do not explicitly allow for recovery of expert witness fees. Therefore, the Court must deduct from the costs award those amounts, beyond $30.00, incurred as a result of Dr. Moore's and Mr. Moriarty's attendance.

Plaintiff's bill of costs indicates that plaintiff spent $4,207.50 for the services of Peat, Marwick, Main & Associates, the firm for which Mr. Moriarty works. The bill also shows that Dr. Moore commanded fees totaling $2,945.50. Unfortunately, the bill does not definitively indicate what portion of these fees resulted from the experts' attendance and testimony at trial, and what portion resulted from other, recoverable services rendered by the experts. The Court cannot determine whether the experts charged an hourly fee for attendance, or if they charged lump-sum appearance fees. However, the quality of the testimony and the preparation necessary to properly testify indicates that a substantial portion of the experts' fees were incurred before the experts actually testified. It is fair and reasonable to assume that half of the costs chargeable for the experts resulted from actual testimony time, and half was due to trial preparation and strategy. Thus, plaintiff may recover one-half of expert fees plus the $30.00 attendance fees. The arithmetic yields the following result.

Plaintiff's Costs Incurred	$13,276.57
One-half of Dr. Moore's Fees	- 2,103.75
One-half of Mr. Moriarty's Fees	- 1,472.75
Allowable Attendance Fees	+ 60.00
TOTAL COSTS ALLOWED	$ 9,760.07

D. *Plaintiff's Motion to Increase the Amount of the Bond*

The Court denies this motion. The question of whether to increase the amount of security is now moot because the Court has ruled on the post-trial motions and plaintiff can execute the judgment. Should defendants appeal today's ruling, they must of course comply with Fed. R. Civ. P. 62(d) and Rule 62.2 of the Local Rules of the United States District Court for the District of Massachusetts.

IV. CONCLUSION

For the reasons stated above, the Court

(1) GRANTS defendants' motion for judgment notwithstanding the verdict on the question of liquidated damages and on count VII, and DENIES the motion for judgment notwithstanding the verdict or new trial in all other respects;

(2) DENIES defendants' motion to alter or amend the judgment;

(3) GRANTS plaintiff's motion for attorney's fees in the amount of $175,564.57, and for costs in the amount of $9,760.07; and

(4) DENIES plaintiff's motion to increase the amount of the bond.

The Clerk is hereby ORDERED to enter judgment in accordance with today's Memorandum and Order, and to award prejudgment interest on the entire award at the appropriate rates.

It is So Ordered.

Chief United States District Judge

United States Court of Appeals
For the First Circuit

No. 91-1591

WALTER F. BIGGINS,
PLAINTIFF, APPELLEE,

v.

THE HAZEN PAPER COMPANY, ET AL.,
DEFENDANTS, APPELLANTS.

No. 91-1614

WALTER F. BIGGINS,
PLAINTIFF, APPELLANT,

v.

THE HAZEN PAPER COMPANY, ET AL.,
DEFENDANTS, APPELLEES.

ORDER OF COURT

Entered: March 19, 1992

The clerk of the district court is requested to add to this court's mandate the amount of appellate attorney's fees in the amount of $71,798.50 to the plaintiff.

By the Court:

Clerk

[Cert. Copy to the Clerk of the District Court of MAssachusetts]
[cc: Messrs. Harrington and Egan]

Supreme Court, U.S.
FILED
MAY 28 1992
OFFICE OF THE CLERK

(2)

No. 91-1818

In the Supreme Court of the United States

OCTOBER TERM, 1991

HAZEN PAPER COMPANY, *et al.*,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

I. Statement Of The Case

A. *The Case Below*

This case arises out of the termination of plaintiff Walter F. Biggins' employment with Hazen Paper Company ("Hazen Paper" or the "Company") in June, 1986. Plaintiff was discharged from his position as Technical Director of Hazen Paper, a small family-owned business located in Holyoke, Massachusetts, following his refusal to sign a confidentiality agreement required of him as a condition of continuing employment at the Company. The uncontradicted evidence at trial established that Hazen Paper demanded that plaintiff sign the confiden-

tiality agreement following its owners' discovery that — contrary to prior assurances he had given them — Biggins had been marketing consulting services of the type he performed for Hazen Paper to competitors of the Company.

At trial, plaintiff argued that the Hazens' articulated reasons for discharging him from employment were pretextual, and that their true motivation was to prevent his imminent vesting in the Company pension. The jury returned a verdict in favor of plaintiff, and awarded him $560,775.00 in compensatory damages under the Age Discrimination In Employment Act ("ADEA"). The jury also found the Hazens' purported violation of the statute to have been "willful." Accordingly, the District Court assessed an additional $560,775.00 in liquidated damages against the Company pursuant to Section 7(b) of the ADEA, 29 U.S.C. § 626(b).

On defendants' post-trial motion for judgment n.o.v., the District Court upheld the jury's finding of ERISA liability against the Company for interference with pension benefits, as well as age discrimination liability under the ADEA. However, the District Court held the evidence inadequate to sustain the jury's additional finding of willfulness, and struck the award of liquidated (double) damages previously assessed against Hazen Paper.[1]

After the verdict, plaintiff moved for statutory attorney's fees, seeking an enhancement of the "lodestar figure" (which plaintiff asserted to be $182,058.25) to $666,729.12, or one-third of the judgment on all counts (state law included) entered in the District Court. This enhancement, plaintiff argued, was warranted by the contingent nature of the representation provided by his trial counsel. In support of this motion, plaintiff submitted ledgers detailing the attorney hours worked on the case. Plaintiff also submitted an affidavit concerning his reten-

[1] On appeal, the First Circuit affirmed the judgment with respect to the ERISA claim. The court also affirmed the judgment as to the underlying ADEA liability, but reversed the lower court's entry of judgment n.o.v. against the jury's willfulness finding, and reinstated approximately $420,000.00 in liquidated damages.

tion of counsel. In his affidavit, plaintiff acknowledged that two of the four law firms he contacted before retaining trial counsel conceded that they were not competent to handle certain substantive aspects of his case. A third law firm agreed to take Biggins' case on a contingency basis with a modest retainer; and a fourth lawyer declined to represent Biggins because he felt the matter was too time-consuming for a sole practitioner. Finally, plaintiff submitted the affidavit of his chosen counsel, and those of two other local lawyers, each attorney stating that civil rights and ADEA cases in Massachusetts are typically undertaken on a one-third contingent fee arrangement.

After having "carefully examined the documentation" submitted by plaintiff in support of his motion for attorney's fees, the District Court recalculated the lodestar figure as $175,564.75, or $6,493.50 less than the amount claimed by plaintiff. This minor reduction reflected the court's determination that a lower hourly rate should have been applied to work performed on "non-core" matters. In its ruling, the court accepted plaintiff's use of present hourly rates in calculating the lodestar, but rejected cross-petitioner's demand that the lodestar figure be "enhanced" to the amount plaintiff agreed to pay trial counsel under his contingency fee arrangement, *viz.*, one-third of the total damages awarded.

In reaching this decision, the District Court surveyed the recent decisions of this Court addressing the issue of fee enhancement, and acknowledged plaintiff's affidavits concerning the prevalent use of private contingent arrangements in civil rights cases. In denying the requested enhancement, the court noted that Justice O'Connor (writing for herself and for four other Justices on this issue) had:

> "decided that while a district court could properly consider the contingent nature of a case when determining a reasonable attorney's fee under federal fee-shifting provisions *[Pennsylvania* v. *Delaware Valley Citizens' Council*, 483 U.S. 711, 731 (1987) *("Delaware Valley II")]*, a court

> may not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel. *Id.* at 733. Likewise, the Court cannot adjust the lodestar due to the " 'legal' risk or risks peculiar to the case." *Id.* at 734. Neither may the Court consider the quality of the representation or the complexity of the case when considering adjustment of the lodestar. *Pennsylvania* v. *Delaware Valley Citizens' Counsel*, 478 U.S. 546, 565 (1987) ("Delaware Valley I"). Rather, the lodestar " 'is presumed to be the reasonable fee' to which counsel is entitled." *Delaware Valley I*, 478 U.S. at 564, citing *Blum*, 465 U.S. at 897.
>
> This case is not sufficiently rare or exceptional to justify an enhancement of the lodestar. The Court is satisfied that the lodestar adequately compensates counsel for the work provided in this action, and that an award of $175,564.57 is sufficient to attract competent counsel in the relevant market. Furthermore, the Court cannot, under the law or consistent with conscience, award an attorney's fee almost four times the amount of the lodestar. Such a departure would be an abuse of discretion in light of the frugal methods adopted in recent Supreme Court cases. In sum, because the Court finds that the lodestar figure embodies a reasonable attorney's fee within the meaning of the ADEA and ERISA, the Court will award plaintiff that amount." (App. at pp. 85-86.)

On cross-appeal, the First Circuit affirmed the District Court's denial of plaintiff's motion that his fee award be enhanced "to reflect the contingency of service — the risk involved of not getting paid." The First Circuit identified plaintiff's case as falling within that class of cases where fee enhancement is not necessary, *i.e.*, cases " 'where any plaintiff, impecunious or otherwise, has a damages case that competent lawyers would take in the absence of fee-shifting statutes.' *[Delaware Valley II, supra]* at 726 (plurality opinion)." (App. at p. 46.)

The Court of Appeals below noted that, under the analysis adopted by both the plurality opinion and the dissenters in *Delaware Valley II*, the issue of fee enhancement would arise only in cases where "'the damages likely to be recovered are not sufficient to provide adequate compensation to counsel, as well as to those frequent cases in which the goal is to secure injunctive relief to the exclusion of any claim for damages.' " (App. at pp. 46-47, quoting *Delaware Valley II*, *supra* at 726 (plurality opinion).) The First Circuit then concluded that in cases (such as the present one) where "the attorney has entered into a contingent fee contract in a suit seeking substantial damages," *id.* at 749 (Blackmun, J., dissenting), no enhancement is called for. The Court of Appeals found that, under the contingent contract into which he had entered, and without any enhancement of the lodestar, "Plaintiff's counsel, as he anticipated, will in fact be rewarded with a premium in excess of his normal hourly rates." (App. at p. 47.)[2] On that basis, the Court of Appeals denied plaintiff's motion for an enhancement to the lodestar used to determine his attorney's fee.

II. Reasons For Denying The Writ

THE DECISION OF THE FIRST CIRCUIT IS FULLY IN ACCORD WITH WELL-ESTABLISHED PRINCIPLES GOVERNING THE AWARD OF ATTORNEY'S FEES UNDER FEDERAL FEE-SHIFTING STATUTES, AND NO EXCEPTIONALLY IMPORTANT ISSUE OF LAW IS PRESENTED BY THE CROSS-PETITION TO WARRANT SUPREME COURT REVIEW.

The instant cross-petition attacks decisions of the District Court and First Circuit which are fully in accord with well-established principles governing the award of attorney's fees.

[2] As the First Circuit observed, plaintiff's contingent fee contract was not made part of the record. The First Circuit assumed, and cross-petitioner nowhere disputes, that such a contract exists, and provides for the payment by plaintiff to his attorney of one-third the damages recovered, without regard to such amount, if any, that may be awarded pursuant to a fee-shifting statute.

Far from abusing the discretion accorded them by federal fee-shifting statutes, the courts below properly applied well-settled law as to which the Supreme Court has recently (and, on this issue, unanimously) addressed itself.

Faced with decisions below that are unassailable, cross-petitioner has asked this Court to disregard several of its own recent decisions, and to adopt an extreme and unprecedented position that is apparently advocated by no state or federal court in the land. Moreover, cross-petitioner makes this extraordinary request on the basis of a factual record that is wholly unsuited to the task, even were the Court to accept cross-petitioner's unsupported legal premises. Finally, plaintiff's attempt to ally his cross-petition with a case from the Second Circuit to which certiorari has recently been granted is both wrong and misleading. Indeed, that case is distinguishable from the matter at bar on the basis of the *precise* legal principles identified by the First Circuit below and by this Court in *Delaware Valley II*. Far from suggesting the instant case as a certiorari-worthy companion for this Court to review, the Second Circuit's decision only further confirms the error of cross-petitioner's position.

The cross-petition identifies no important question of federal law, no split of opinion among the circuit courts, and no deviation by the First Circuit from the teachings of this Court. To the contrary, the decision of the Court of Appeals below adheres to a view of attorney's fee enhancement embraced by *every* Justice of this Court to have considered it. For these reasons, the cross-petition should be denied.

A. *The Courts Below Properly Applied Settled Law In Denying The Plaintiff's Demand For Fee Enhancement.*

The appropriate standard for review of an attorney's fee award is abuse of discretion. *Evans* v. *Jeff D.*, 475 U.S. 717, 742-43 (1986); *Blum* v. *Stenson*, 465 U.S. 886, 896 (1984). Far from having abused its discretion, the District Court below

applied well-established law in denying plaintiff's demand that the lodestar figure calculated by the court be "enhanced" to the amount of the contingent fee which plaintiff had agreed to pay his attorneys. In affirming this denial, the First Circuit correctly identified the critical distinction between the present case and cases such as *Delaware Valley II* and *Dague* v. *Burlington*, 935 F.2d 1343 (2d Cir. 1991), *cert. granted*, 112 S.Ct. 964 (1992). This distinction is between cases in which no enhancement is required to attract competent counsel, and cases where, without the prospect of such an enhancement, meritorious claims will not be pursued for want of counsel. That this essential distinction is ignored in the cross-petition provides no basis for the Supreme Court to grant review.

Cross-petitioner makes much of the division of this Court in *Delaware Valley II*, and the split among the circuits which followed in its wake, on the question of whether awards under federal fee-shifting statutes should be enhanced in *any* case to reflect the contingent basis on which legal representation was provided. Cross-petitioner, however, ignores the fundamental (and, for purposes of the cross-petition, dispositive) point on which this Court was *unanimously* agreed in *Delaware Valley II*. Namely, no enhancement is called for where the plaintiff and his attorney have entered into a private contingent fee contract (*i.e.*, one providing for plaintiff's attorney to be paid a percentage of the gross recovery, and not merely assigning to counsel the court-awarded fee) in a suit seeking substantial damages; because in such a case, the plaintiff's attorney has mitigated the risk of being paid nothing "by exchanging the risk of nonpayment for the prospect of compensation greater than the prospective lodestar amount." *Delaware Valley II*, *supra*, at 749 (Blackmun, J., dissenting).

The Justices of this Court are thus in complete agreement that the goal of the fee-shifting statutes, *viz.*, to enable "those who cannot pay a lawyer for his time and effort to obtain competent counsel," *id.* at 725 (plurality opinion), does not require enhancement "where any plaintiff, impecunious or otherwise,

has a damages case that competent lawyers would take in the absence of fee-shifting statutes." *Id.* at 726 (plurality opinion). Enhancement is only appropriate, even under the expansive view taken by the dissent in *Delaware Valley II*, where the attorney's sole (or primary) compensation will be the court-awarded fee itself. It is *this* kind of contingent arrangement (of the type found in *Delaware Valley II*, a case involving no damages award from which a private contingent fee might have been funded) which spawned division within the Court. As to cases like the present one, by contrast, where the potential damages are sufficient to attract competent counsel under a private contingency contract, and where payments under that contract are well in excess of the lodestar, the Justices of this Court have agreed without exception that no enhancement is appropriate.[3]

In identifying this critical distinction, the Justices of the Court have clearly held that "no enhancement for risk [of non-payment] is appropriate unless the applicant can establish that

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[3] Cross-petitioner argues that the First Circuit erred in citing Justice White's plurality opinion in *Delaware Valley II*, and that the First Circuit is thus in conflict with those circuits which have followed Justice O'Connor's concurrence. Cross-petitioner, however, misses the point that was correctly identified by the First Circuit. On the issue of whether an enhancement to the lodestar is required where the prevailing party and his attorney have entered into a private contingent fee agreement, the plurality and dissent of *Delaware Valley II* are in complete accord that enhancement is improper.

Cross-petitioner further argues that the First Circuit somehow misapplied this Court's holding in *Venegas* v. *Mitchell*, 495 U.S. 82 (1990), by looking to the award received by the plaintiff's attorney (rather than "what the losing defendant should pay", *see* Cross-Petition at p. 9) in determining that no adjustment to the lodestar was required. This suggestion by the cross-petitioner is mystifying. *Venegas* simply holds that a court award of fees poses no bar to an attorney's right to collect in full under a contingency contract. The Court in *Venegas* observed that if the court-awarded counsel fee established a cap on an attorney's compensation, competent counsel might be dissuaded from taking civil rights cases under private contingent contracts. Here, therefore, it is the cross-petitioner who disregards this Court's decision in *Venegas*, baselessly urging that the contingency award received by a plaintiff's attorney determine the reasonable counsel's fee which the defendant should be required to pay.

without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market,' " *id.* at 733 (O'Connor, J., concurring, quoting plurality opinion at 731). Typically, such "substantial difficulties" will be encountered where no damages are sought (as was the case in *Delaware Valley II* and in *Dague*, which had not yet reached the damages phase at the time of the fee award), or where the potential damages award would be inadequate to support a sufficiently attractive contingency contract. *See Delaware Valley II*, *supra*, at 744 (Blackmun, J., dissenting). As recognized by the First Circuit, such rare cases bear no resemblance to the case at bar, where the availability of substantial back-pay damages was more than sufficient to attract suitable counsel.

The distinction identified by this Court in *Delaware Valley II*, and properly applied by the First Circuit in the present case, unquestionably requires the denial of the cross-petition. Indeed, under the mandate of *Delaware Valley II*, an abuse of discretion *would* have been committed had the District Court awarded fee enhancement in a case where the plaintiff had "a damages claim that competent lawyers would take in the absence of the fee-shifting statutes", *id.* at 726 (plurality opinion), *i.e.*, a case where "the attorney has entered into a contingency fee contract in a suit alleging substantial damages". *Id.* at 749 (Blackmun, J., dissenting).[4]

[4] The cross-petition insists that the First Circuit has somehow erred in "reviewing the issue only in hindsight, by asserting that risk enhancement should be assessed after the case is concluded, on the basis of the size of the verdict." *See* Cross Petition at p. 9. Cross-petitioner again misstates the First Circuit's rationale in order to manufacture a conflict between the Court of Appeals' opinion and the teachings of this Court in *Delaware Valley II*. In noting that the plaintiff had achieved an award sufficient to fund a contingency fee contract that would attract competent counsel in future cases (as the prospect of damages before the verdict was sufficient to attract trial counsel), the First Circuit merely relied upon the distinction drawn by this Court to distinguish those cases where enhancement is necessary to the retention of counsel, from those where it is not. Likewise, the First Circuit's analysis of the trial outcome served to deflate the untenable suggestion in plaintiff's attorney's

In a substantial damages case such as the present one, this Court has recognized that the plaintiff does not "face[] substantial difficulties in finding counsel", and, therefore, "no enhancement for risk is appropriate". *Id.* at 733 (O'Connor, J., concurring).[5] As found by the courts below, the appropriate award of attorney's fees here is the traditional "reasonable attorney's fee", *id.* at 749 (Blackmun, J., dissenting), calculated in the usual way. "If the contingency fee is greater than the statutory fee, plaintiff [and not the defendant] shall pay the difference to his counsel". *Hamner* v. *Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985) (cited with approval in *Delaware Valley II*, *supra*, at 749 (Blackmun, J., dissenting)). This follows because, where the plaintiff has entered into a private contingency agreement with his attorney, "[t]he defendant is not ... required to pay the amount called for in a contingent fee contract if it is more than a reasonable fee calculated in the usual way." *Blanchard* v. *Bergeron*, 489 U.S. 87, 93 (1989). For this reason, the refusal to enhance cross-petitioner's attorney's fee award beyond the lodestar was clearly correct, and should not be disturbed.[6]

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affidavit, that, in the absence of some enhancement to the lodestar (which plaintiff's counsel appeared mistakenly to have believed would have been *his* to keep), he would have been discouraged from taking future cases. As the First Circuit pointed out, plaintiff's attorney here "will in fact be rewarded with a premium in excess of his normal hourly rates", counsel's own definition of the incentive required if he were to take such cases in the future.

[5] Apparently recognizing this defect in the cross-petition, plaintiff urges, remarkably, that the Court "clarify" the issue for contingency cases by jettisoning the "substantial difficulty" requirement by which the current standard for enhancement is defined.

[6] The cross-petition (at p. 7) accuses the District Court, which noted that the case was "not sufficiently rare or exceptional to justify an enhancement of the lodestar", of having misapplied Justice O'Connor's instruction that enhancement decisions, where appropriate, should be based "on the difference in market treatment of contingent fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case." *Delaware Valley II*, *supra*, at 731 (O'Connor, J., concurring). The District Court did no such thing. The court's conclusion that there was nothing rare or exceptional about cross-petitioner's case followed immediately on its observation that "the lodestar

B. *There Is No Precedent For Cross-Petitioner's Claim.*

While it is altogether clear under established Supreme Court precedent that any enhancement for contingency would have been inappropriate under the facts of this case, cross-petitioner has adopted a contrary position on the issue that is nothing less than radical. Suggesting that a contingency enhancement should not be merely some addition to or multiplier of the lodestar (such as the 25% enhancement awarded in *Dague*), cross-petitioner argues that courts should use the contingent fee contract itself as the basis for determining the "reasonable attorney's fee" provided by statute. Hazen Paper Company has been unable to locate even a single state or federal court which has adopted this position in the wake of *Delaware Valley II*, and cross-petitioner cites no authority in support of such a proposition.

The dearth of precedent for cross-petitioner's position is hardly surprising in light of this Court's repeated observation that, even in cases where the plaintiff and his attorney have entered into a private contingent contract, "we have adopted the lodestar as the centerpiece of attorney's fee awards. The *Johnson* factors may be relevant in adjusting the lodestar amount[,] but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." *Blanchard* v. *Bergeron*, *supra*, 489 U.S. at 94. As this Court has noted, Congress expressly rejected "the notion that attorney's fees [under fee-shifting statutes] should be based on private-sector fee arrangements." *Riverside* v. *Rivera*, 477 U.S. 561, 578 n.9 (1986) (plurality opinion). "In most fee-shifting cases . . . the private market model of contingency compensation will provide very little guidance." *Dela-*

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is presumed to be the reasonable fee to which counsel is entitled". The court merely observed that there had been nothing shown to take the present case out of this presumption. Indeed, the District Court expressly acknowledged, in language ignored by the cross-petitioner, that "the Court cannot adjust the lodestar due to the 'legal risk or risks peculiar to the case.' *Id.* at 734 [O'Connor, J., concurring]." (App. at p. 86.)

ware Valley II, *supra*, 483 U.S. at 731 (O'Connor, J., concurring).

The decision identified by this Court in *Blanchard* as supplying the relevant factors for determining any enhancement to the lodestar (in those rare cases where, unlike the present one, enhancement might be necessary to attract competent counsel) itself repudiates the position advocated in the cross-petition. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the court declared:

> "The fee quoted to the client or the percentage of the recovery agreed to is helpful in determining the attorney's fee expectations when he accepted the case. But as pointed out in *Clark* v. *American Marine*, *supra*,
>
> > [t]he statute does not prescribe the payment of fees to the lawyers. It allows the award to be made to the prevailing party. Whether or not he agreed to pay a fee and in what amount is not decisive. Conceivably a litigant . . . might agree to pay his lawyer a percentage contingent fee that would be greater than the fee the court might ultimately set. Such arrangements should not determine the court's decision. The criterion for the court is not what the parties agreed to but what is reasonable."

Id. at 718.

Notwithstanding the total absence of any support in the cases for his position, cross-petitioner seeks to reverse decades of fee-award law, as well as this Court's own recently articulated standards for when enhancement might be appropriate and how it should be determined. In its place, cross-petitioner urges the Court to adopt a long-discredited presumption whereby the terms of a contingent fee contract would provide the basis for an award of counsel fees under the fee-shifting statutes. Such an over-reaching petition neither addresses an important question

of federal law, nor asks the Court to resolve a conflict among the circuits. It should be denied.

C. *The Cross-Petition's Policy Arguments Provide No Basis For The Requested Reversal Of Settled Law.*

Cross-petitioner advances a series of policy arguments purportedly supporting his theory of contingency enhancement. Such arguments for abandoning the standards of fee enhancement adopted by this Court in *Delaware Valley II*, however, and followed by the courts below, are plainly without merit.

First, cross-petitioner suggests that attorneys, having entered into private contingency arrangements, will somehow be deterred from bringing civil rights actions if no fee enhancement is available to them, in light of "the risk for counsel who accepts the case on a contingent basis". *See* Cross-Petition at p. 13. This argument would have merit, however, only if the court's award of fees under a fee-shifting statute served as a ceiling on what the attorney could collect from the prevailing plaintiff. This Court, however, has squarely (and recently) rejected the contention that the reasonable fees awarded under federal fee-shifting statutes should cap payments owed to the prevailing attorney. *See Venegas* v. *Mitchell*, 110 S.Ct. 1679 (1990). In *Venegas*, the Court observed that none of its cases "has indicated that [the civil rights fee-shifting statute], by its own force, protects plaintiffs from having to pay what they have contracted to pay, even though their contractual liability is greater than the statutory award that they may collect from losing opponents." *Id.* at 1684. That is no less true where, due to the presence of a private contingency contract, the fee-shifting statute "would not have authorized the District Court to enhance the statutory award upward from the lodestar figure based on the contingency of non-recovery in this particular litigation." *Id.* at 1682.

Cross-petitioner's other policy argument is that civil rights plaintiffs of limited means will be disadvantaged, contrary to

the intent of the fee-shifting statutes, if they are required to bear any portion of the costs of paying their attorney's fees (*i.e.*, the difference between the court-awarded "reasonable fee" and the amount agreed to in a private contingent fee contract). This argument, however, fails to recognize that the plaintiff who brings his case under a private contingent fee arrangement has received a distinct economic advantage over the plaintiff who hires an attorney on a fixed retainer or an hourly basis: *viz.*, the opportunity to bring a potentially unsuccessful claim at *no* cost whatsoever.

It must be noted in this respect that the plaintiff of means whose attorney's charges exceed the lodestar amount, as is frequently the case, will be required to pay some costs out of pocket even if he prevails, and will be required to pay *all* of his legal expenses if the lawsuit does not succeed. The less affluent plaintiff who brings a claim pursuant to a private contingent fee contract may also have to bear some of the costs of representation — but only if he prevails, and only up to a reasonable portion of the gross recovery.[7]

Relieving plaintiff of any share of the cost of his contingency arrangement would, in effect, grant him the windfall benefit of having been able to bring potentially *unsuccessful* litigation at no cost, with no corresponding burden. This burden, the monetary delta between the lodestar figure and the contingency contract amount, would be borne entirely (and unfairly) by the defendant. Cross-petitioner does not assert (and the record will not support) that, in the absence of a fee enhancement, plaintiff would have failed to bring his claim. Moreover, allowing plaintiff to bear some portion of the contingency payment to which he agreed will hardly undermine the Congressional intent

[7] As this Court has observed, "[c]ivil rights plaintiffs, if they prevail, will be entitled to an attorney's fee that Congress anticipated would enable them to secure reasonably competent counsel. If they take advantage of the system as Congress established it [*i.e.*, by promising to pay the lawyer the statutory award of a reasonable attorney's fee] they will avoid having their recovery reduced by contingent-fee agreements." *Venegas*, *supra*, at 1684.

underlying the fee-shifting statutes — *i.e.*, that meritorious claims not be stalled by the costs of securing competent counsel. *See Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983).

In addition to the foregoing, requiring defendants to pay the costs of any risk contingency built into a private fee contract would, in effect, force defendants to subsidize prevailing attorneys for the costs of bringing other, unsuccessful litigation. This is wrong. "The prevailing party may expect full compensation for prevailing claims; there is no provision for compensating losing, unrelated claims in the same case, or other losing cases which might or might not involve the same parties." *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4, 27-28 (1985), *cert. denied*, 472 U.S. 1021 (D.C. Cir. 1985) (quoted in *Delaware Valley II*, *supra*, at 720). For these reasons, public policy militates strongly against the cross-petitioner's position.

D. *The Record Below Cannot Support The Position Advocated By The Cross-Petition.*

Before the District Court, plaintiff below filed two affidavits of local counsel, to the effect that civil rights and employment discrimination cases are frequently taken by attorneys on a contingency basis. Plaintiff also filed the affidavit of his own attorney, who stated that:

> "I undertook to represent Mr. Biggins on a one-third (⅓) contingency fee basis . . because our risk taking had the potential for reward in excess of our normal hourly rates. If the Court's award of attorneys' fees is limited to payment for hours expended multiplied by our normal hourly rate, then I would be discouraged from taking these types of cases in the future". (Court of Appeals Joint Appendix I, at p. 117.)

As the First Circuit correctly observed, however, nothing in its or the District Court's refusal to enhance the lodestar figure

could serve as a disincentive for counsel to take plaintiff's case, because, under the contingent fee contract, he would "in fact be rewarded with a premium in excess of his normal hourly rates." (App. at p. 47.) Cross-petitioner cannot now seriously contend that the amount his attorneys received under their contingent fee contract would, in future cases, be insufficient to attract competent counsel.

As an alternative argument, cross-petitioner maintains that there is an "inequity" in forcing a plaintiff to bear the difference between the contingent fee amount for which he contracted and the lodestar amount awarded by the court. The Supreme Court, however, has described this *very* argument as "wide of the mark." *Venegas, supra,* at 1684. Furthermore, even if such an inequity did exist, plaintiff fails to indicate that this prospect in any measure discouraged him from bringing suit. In short, there is nothing to suggest that the policy of providing full access to the courts requires any enhancement of the lodestar figure in cases where, as here, the recoverable damages suffice to attract competent counsel to offer their representation on a private contingency fee basis.[8]

E. *The Cross-Petition's Attempt To Ally The Present Case With* Dague *Is Wholly Without Merit.*

In an effort to convince this Court of the merit of his cross-petition, plaintiff attempts to portray the present case as "an appropriate compliment [sic] to *Dague* [v. *Burlington*, 935 F.2d 1343 (2d Cir. 1991)]", a case where certiorari was recently granted. Notwithstanding cross-petitioner's assertion that "[t]his case presents the same question as presented in *Dague*", however, the two cases are in fact quite different. Indeed, they

[8] Nor do the two affidavits of local counsel assist the plaintiff in this regard. That employment discrimination cases are commonly taken by attorneys on the basis of contingent fee contracts indicates precisely that the potential damages awards in these cases *are* sufficient to attract counsel *without* the prospect of further fee enhancement.

are distinguishable by the very distinction identified by every member of this Court in *Delaware Valley II*.

In *Dague*, the award of attorney's fees came after a finding of liability, but before any trial on the issue of damages. *Dague*, *supra*, 935 F.2d at 1347. Thus, in *Dague*, the payment of any attorney's fee depended entirely on the court's awarding some enhancement for the risk of non-payment, because there were no damages upon which a private contingency fee contract sufficient to attract competent counsel could have been based. *Dague* is thus precisely the kind of case which at least the dissenters in *Delaware Valley II* believed might require the availability of enhancement as a means of securing counsel, *viz.*, one where "[w]ithout the possibility of a fee enhancement competent counsel might refuse to represent clients, thereby denying them effective access to the courts." *Dague*, *supra*, at 1360 (internal citations omitted).

In the present case, by contrast, counsel was attracted not by the chance of court-awarded fee enhancement, but by the possibility of sharing in a substantial damages recovery, as, ultimately, he did. There is no suggestion in the record that the absence of an enhancement would have caused plaintiff to face any "substantial difficulty in obtaining counsel of reasonable skill and competence". *Dague*, *supra*, at 1360. This case, then, belongs to that class of litigation found by both the plurality and the dissent in *Delaware Valley II* as meriting only an award of reasonable attorney's fees calculated in the usual way. As such, it is hardly an appropriate complement to *Dague*.

In addition, the enhancement sought in *Dague*, *i.e.*, an additional 25% of the lodestar figure, is consistent with the methodology contemplated in *Delaware Valley II*. The wholesale abandonment of the lodestar method advocated by the cross-petition, by contrast, is not only without precedent in the law since *Delaware Valley II*, it is flatly at odds with *Dague* itself. The present case is thus hardly an appropriate one to pair with the Court's consideration of *Dague*, and cross-petitioner's facially meritless claims are in no way complementary to the important issues raised by *Dague*.

Conclusion

For all of the foregoing reasons, the Cross-Petition for Certiorari should be denied.

Respectfully submitted,

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